Supreme Court, U.S.
FILED

No. 01-1135 JAN 31 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

THOMAS DOUGLAS ARTHUR,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

Theresa Trzaskoma
Heiner Braun
Suhana S. Han
Katherine Richardson
125 Broad Street
New York, New York 10004
(212) 558-4000

Russell Neufeld
Counsel of Record
Arnold J. Levine
E. Niki Warin
c/o Legal Aid Society
49 Thomas Street
New York, New York 10013
(212) 732-5000

Counsel for Petitioner
Thomas Douglas Arthur

January 31, 2002

95 pp

CAPITAL CASE

Questions Presented for Review

1. Whether a state's application of its postconviction filing deadline against an inmate under sentence of death violates the due process and fundamental fairness requirements of the Fourteenth Amendment to the Constitution when the inmate: (i) was not represented by counsel during the period of limitations; (ii) did not have access to any form of legal assistance; (iii) did not have access to adequate law library facilities; (iv) was prevented by the state from meeting with persons who might have been able to assist him; and (v) did not receive notice that the certificate of judgment had been entered and therefore did not know that the period of limitations had begun to run.

2. Whether a state's failure to provide postconviction counsel violates a capital defendant's rights under the Sixth and Fourteenth Amendments to the Constitution, when postconviction proceedings are the first opportunity for the defendant under sentence of death to raise constitutional claims of ineffective assistance of trial and appellate counsel.

3. Whether a state's failure to provide an inmate under sentence of death with state-funded counsel or any form of legal assistance in connection with state postconviction proceedings constitutes a violation of the inmate's rights under the Eighth and Fourteenth Amendments to the Constitution.

Table of Contents

Table of Authorities i

Index to Appendix vi

Orders and Opinions Below 1

Jurisdiction 1

Constitutional Provisions 1

Statement of the Case 2

Reasons for Granting the Petition 8

I. Alabama's Application of Its Postconviction Statute of Limitations Against Petitioner Violated Due Process and Fundamental Fairness. 8

II. Alabama's Failure to Provide Counsel to Petitioner in Connection with State Postconviction Proceedings Violated the Sixth and Fourteenth Amendments. 18

III. Alabama's Failure to Provide Counsel or Any Legal Assistance to Petitioner Violated the Eighth and Fourteenth Amendments. 24

Conclusion 29

Table of Authorities

Federal Cases

Ake v. *Oklahoma*, 470 U.S. 68 (1985) 12, 13, 14

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 12

Beck v. *Alabama*, 447 U.S. 625 (1980) 12, 28

Bonin v. *Calderon*, 77 F.3d 1155 (9th Cir. 1996) 23

Bounds v. *Smith*, 430 U.S. 817 (1977) 22, 24, 26, 27

Calderon v. *United States District Ct.*, 163 F.3d 530 (9th Cir. 1998) 16

Coleman v. *Thompson*, 501 U.S. 722 (1991) 21, 22, 23

Daniels v. *United States*, 121 S. Ct. 1578 (2001) 21

Davis v. *Johnson*, 158 F.3d 806 (5th Cir. 1998) 16

Douglas v. *California*, 372 U.S. 353 (1963) 19, 20, 21

Dunlap v. *United States*, 250 F.3d 1001 (6th Cir. 2001) 16

Evitts v. *Lucey*, 469 U.S. 387 (1985) 9, 20

Fahy v. *Horn*, 240 F.3d 239 (3d Cir. 2001) 16, 17

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 19, 20, 21

Green v. *Georgia*, 442 U.S. 95 (1979) 13

Gregg v. *Georgia*, 428 U.S. 153 (1976) 26, 28

Griffin v. *Illinois*, 351 U.S. 12 (1956) 20

Harris v. *Hutchinson*, 209 F.3d 325 (4th Cir. 2000) 16

Hill v. *Jones*, 81 F.3d 1015 (11th Cir. 1996) 23

Jones v. *Morton*, 195 F.3d 153 (3d Cir. 1999) 16

Kreutzer v. *Bowersox*, 231 F.3d 460 (8th Cir. 2000) 16

Lewis v. *Casey*, 518 U.S. 343 (1996) 24, 25, 26, 27

Lockett v. *Ohio*, 438 U.S. 586 (1978) 12, 28

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982) 10, 11, 13

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996).....20, 23

Mackall v. *Angelone*, 131 F.3d 442 (4th Cir. 1997).....23

Marks v. *United States*, 430 U.S. 188 (1977) 26

Martinez v. *Johnson*, 255 F.3d 229 (5th Cir. 2001) 23

Mathews v. *Eldridge*, 424 U.S. 319 (1976).....11, 17

Miller v. *Marr*, 141 F.3d 976 (10th Cir. 1998) 16

Mullane v. *Central Hanover Bank & Trust Co.*,
339 U.S. 306 (1950).....10

Murray v. *Giarratano*,
492 U.S. 1 (1989).....20, 21, 22,25, 26

Nolan v. *Armontrout*,
973 F.2d 615 (8th Cir. 1992) 23

Ohio Adult Parole Authority v. *Woodard*,
523 U.S. 272 (1998) 9, 11

Parkhurst v. *Shillinger*,
128 F.3d 1366 (10th Cir. 1997) 23

Pennsylvania v. *Finley*, 481 U.S. 551 (1987).....20, 21

Reece v. *Georgia*, 350 U.S. 85 (1955) 13

Ross v. *Moffitt*, 417 U.S. 600 (1974).....20, 21

Sandvik v. *United States*,
177 F.3d 1269 (11th Cir. 1999) 16

Smith v. *McGinnis*, 208 F.3d 13 (2d Cir. 2000).....16

Stanford v. *Kentucky*, 492 U.S. 361 (1989) 27, 28

Trop v. *Dulles*, 356 U.S. 86 (1958) 27

Vitek v. *Jones*, 445 U.S. 480 (1980) 10

Williams v. *Georgia*, 349 U.S. 375 (1955) 12

Wyzykowski v. *Department of Corrections*,
226 F.3d 1213 (11th Cir. 2000) 16

State Cases

Ex parte Arthur, 372 So.2d 665 (Ala. 1985) 2

Ex parte Arthur, 711 So.2d 1097 (Ala. 1997) 2

Arthur v. *State*,
575 So.2d 1165 (Ala. Cr. App. 1990) 2

Arthur v. *State*,
711 So.2d 1031 (Ala. Cr. App. 1996) 2

Ex parte Boatwright, 471 So.2d 1257 (Ala. 1985) 25

Fine v. *Zenon*, 834 P.2d 509 (Or. Ct. App. 1992) 15

Gibson v. *Turpin*, 513 S.E.2d 186 (Ga. 1999) 19

Ex Parte Ingram, 675 So.2d 863 (Ala. 1996) 19

Jackson v. *Mississippi*,
732 So.2d 187 (Miss. 1999) 19, 22, 23

Jackson v. *State of Arkansas*,
37 S.W.3d 595 (Ark. 2001) 15

Montgomery v. *Tremblay*, 292 S.E.2d 64 (Ga. 1982) 14

Federal Statutes

21 U.S.C. § 848 14

28 U.S.C. § 1257 1

28 U.S.C. § 2244 16

28 U.S.C. § 2254 .....7, 13

State Statutes And Rules

Ala. Code §§ 13A-5-40(13) 2
Ala. R. Crim. P. 24 18
Ala. R. Crim. P. 32 .....*passim*
Ariz. R. Crim. P. 32.....14
Ark. R. Crim. P. 37.....14
Cal. Gov't Code § 68661 .....14, 28
Cal. R. Ct. App. R. 3 15
Colo. Rev. Stat. § 16-12-205 14
Conn. Gen. Stat. § 51-296 14
Del. Super. Ct. Crim. R. 61 15
Fla. Stat. Ch. § 27.702.....14, 28
Idaho Crim. R. 44.2 14
Ill. Comp. Stat. 5/122-1 .....15, 28
Ind. R. Crim. P. 24.....14
Kan. Stat. Ann. § 60-1507 14
Ky. Civ. R. 60.02 15
La. C. Cr. P. Art. 930.8 15
La. Rev. Stat. § 15:149.1 14
Md. Code Ann. Crim. P. § 7-108 14
Miss. Code. Ann. § 99-39-23 .....14, 28
Mont. Code Ann. § 46-21-201 14
Mo. S. Ct. R. 91.02 15
N.C. Gen. Stat. § 7A-451 14
N.C. Gen. Stat. Ann. § 7A-486.3 .....14, 28

N.J. Stat. Ann. § 2a:158A-5 14

N.M. Stat. Ann. § 31-11-6 14

N.Y. C.L.S. Jud. Law § 35-b 14

Neb. Rev. Stat. § 29-3001 14

Nev. Rev. Stat. Ann. 34.726 15

Ohio Rev. Code Ann. § 2953.21 14

Okla. Stat. tit. 22, § 1089 .....14, 28

Pa. R. Crim. P. 1504 14

S.C. Code Ann. § 17-27-160 14

S.D. Codified Laws § 21-27-3.1 14

Tenn. Code. Ann. § 40-30-301 *et seq.* 14, 28

Tex. Code Crim. Proc. § 11.071 .....14, 15

Utah Code Ann. § 78-35a-202 .....14, 15

Va. Code Ann. § 19.2-163.7 14

Wash. Rev. Code § 10.73.150 14

Miscellaneous

S. 1760, 101st Cong., 135 Cong. Rec. 13480 (1989).....18

Index to Appendix

Order of the Circuit Court of Jefferson County, dated March 14, 2001 ..... A1

Opinion of the Alabama Court of Criminal Appeals, dated April 25, 2001 ..... A8

Certificate of Judgment of the Supreme Court of the State of Alabama, dated November 2, 2001 ..... A16

Motion to File an Out of Time Petition For Relief From Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, dated January 25, 2001 ..... A17

Brief On Appeal From the Circuit Court of Jefferson County, Alabama, dated April 20, 2001 ..... A29

Petitioner, Thomas Douglas Arthur, an indigent inmate under sentence of death, respectfully petitions for a writ of certiorari to review the decision of the Alabama Court of Criminal Appeals, dated April 25, 2001, affirming the order of the Circuit Court of Jefferson County, dated March 14, 2001.[1]

ORDERS AND OPINIONS BELOW

The Certificate of Judgment of the Supreme Court of Alabama is unreported and is reprinted in the appendix at page A16. The opinion of the Alabama Court of Criminal Appeals is unreported and is reprinted in the appendix at pages A8 through A15. The Order of the Circuit Court of Jefferson County, Alabama is unreported and is reprinted in the appendix at pages A1 through A7.

JURISDICTION

The Circuit Court of Jefferson County entered its order on March 14, 2001. The Alabama Court of Criminal Appeals affirmed the order in a decision dated April 25, 2001. The Alabama Supreme Court denied the petition for a writ of certiorari on November 2, 2001. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The Eighth Amendment to the United States Constitution provides in pertinent part: "[C]ruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

---

[1] Mr. Arthur is not proceeding *in forma pauperis* because pro bono counsel have volunteered to pay the filing fee on his behalf.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

STATEMENT OF THE CASE

A. Background Facts

On December 5, 1991, Mr. Arthur was convicted of capital murder in violation of Ala. Code §§13A-5-40(13)(murder by a person with a previous murder conviction in the past twenty years) for the 1982 killing of Troy Wicker, in an alleged murder-for-insurance-proceeds scheme.[2] On the same day, following a sentencing hearing that ended less than an hour and a half after the guilty verdict was returned, the jury recommended the death penalty by a vote of 11-1. On January 24, 1992, the trial court, finding one aggravating factor and one mitigating factor, sentenced Mr. Arthur to death by electrocution.

Mr. Arthur's conviction and death sentence were affirmed by the Alabama Court of Criminal Appeals on March 8, 1996. *Arthur* v. *State*, 711 So. 2d 1031 (Ala. Cr. App. 1996). The Alabama Supreme Court affirmed on November 21, 1997. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997). A motion for rehearing was denied on March 20, 1998. The Alabama Court of Criminal Appeals issued a certificate of judgment on April 7, 1998.

---

[2] This was Mr. Arthur's third trial on the same charges. His two previous trials resulted in convictions and death sentences, which were overturned on direct appeal as a result of constitutional violations. *Ex parte Arthur*, 372 So. 2d 665 (Ala. 1985); *Arthur* v. *State*, 575 So. 2d 1165 (Ala. Cr. App. 1990), *cert. denied*, 575 So. 2d 1191 (Ala. 1991).

Rule 32 of the Alabama Rules of Criminal Procedure required Mr. Arthur to file a petition for postconviction relief within two years from the date on which the certificate of judgment was issued. Mr. Arthur never received a copy of the certificate and therefore had no notice that the statute of limitations for filing his state postconviction petition had started to run (even assuming that, without the benefit of legal assistance, he would have understood the significance of the certificate of judgment).

Although Alabama provides inmates with an opportunity to seek collateral relief, it does not provide legal counsel or any form of legal assistance to criminal defendants at any time after their direct appeal in state court and prior to the filing of a Rule 32 petition, even to inmates under sentence of death. Alabama, unlike almost every other jurisdiction that imposes the death penalty, has no system for providing death row inmates with either counsel or legal assistance to initiate postconviction proceedings. Alabama authorizes its courts to appoint counsel in Rule 32 proceedings, but they are permitted to do so only after a petition has been filed and is not summarily dismissed. *See* Ala. R. Crim. P. 32.7(c). As a result, Mr. Arthur was unrepresented by counsel and had no access to any state-funded legal assistance as of March 20, 1998, when the Alabama Supreme Court denied his motion for rehearing.

Without the benefit of state-funded assistance, Mr. Arthur attempted to obtain legal assistance on his own while confined to his cell on death row at Holman State Prison. Mr. Arthur wrote many letters to individual lawyers and to professional associations, including the American Bar Association, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the Southern Poverty Law Center, requesting their help in obtaining legal representation or some other legal assistance. Mr. Arthur also arranged for someone to post his plea for

legal assistance, along with a brief statement about his case, on the Internet.

Even when Mr. Arthur's pleas for assistance attracted attention from those who might be able to help him, however, the State made it practically impossible for him to access their services or enlist their aid. An investigator who viewed the website and became interested in Mr. Arthur's case, for example, offered to help in both investigating and finding counsel. But the investigator's written requests to visit Mr. Arthur were denied in writing by the Holman State Prison Warden, Charlie Jones. Warden Jones also denied the investigator access to Mr. Arthur even after receiving a letter from a lawyer who stated that he was considering representing Mr. Arthur and asked that the investigator be permitted to visit with Mr. Arthur.

Mr. Arthur's efforts to obtain postconviction relief further were hampered by the State's failure to provide him with adequate law library facilities. Holman State Prison, where Mr. Arthur has been confined for almost the entire time since he was sentenced to death, contains separate law libraries for inmates in general population and those on death row. The death row law library at Holman contains significantly fewer volumes, and has fewer resources than the law library used by general population inmates.

Many important books are missing from the library and the ones that are left behind have had significant pages torn out of them. The books that remain are in poor condition because water constantly leaks on them, leaving them wet and covered with mildew. Books are out of date, and there is no system of advising the inmates of the infrequent arrival of newer books. Books are kept in piles, not on shelves, and are not piled in any particular order.

The general resources in the library are paltry as well. No paralegals or other persons trained in the law have been

assigned to the library, so nobody is available to assist the inmates in using the few useful books that may be there. There is only one typewriter to be shared by all death row inmates (there are currently 184 of them) and it is almost always broken. The only copy machine charges fifty cents per copy, which makes photocopying cases and statutes practically impossible. As an indication of its uselessness for legal research, the death row library is used primarily as a day room by death row inmates at Holman.

In short, the law library for the death row inmates at Holman failed to provide Mr. Arthur with the most basic resources necessary for preparing a meaningful petition for postconviction relief. The combination of lack of counsel and legal assistance, together with the inadequate law library, prevented Mr. Arthur from filing a timely Rule 32 petition in this capital case.

B. Mr. Arthur's Rule 32 Petition

Without counsel or any other legal assistance to aid in the preparation of postconviction papers, and without access to an adequate law library, the deadline for filing a Rule 32 petition came and went without Mr. Arthur's filing a petition. As a result, the State filed a motion in September 2000 to set an execution date. The setting of an execution date for an inmate who did not have counsel brought Mr. Arthur's case to the attention of the Equal Justice Initiative of Alabama ("EJI"), a privately-funded organization that attempts to locate private lawyers to represent indigent capital defendants. In October 2000, EJI succeeded in locating pro bono counsel to take up Mr. Arthur's case. On January 25, 2001, after expeditiously investigating and researching Mr. Arthur's claims, counsel filed a Rule 32 petition in the Circuit Court for Jefferson County, together with a motion to file out of time.

The Rule 32 petition raised numerous federal and state constitutional claims for relief and requested a hearing to address disputed issues of fact and present evidence on them. Importantly, the petition raised substantial issues that had not been litigated in Mr. Arthur's case, including claims that trial and appellate counsel were ineffective, which as a practical matter could not have been raised before postconviction proceedings. In addition, the petition set forth claims of juror misconduct and *Brady* violations.

In the motion to file out of time, Mr. Arthur set forth factual and legal grounds for allowing the submission of his petition beyond the statutory deadline, including the argument that the State's failure to provide any counsel or legal assistance constituted a violation of the U.S. Constitution. (A24-26) The State's response to this motion, submitted on February 26, 2001, contained factual allegations that were disputed by Mr. Arthur and that, at the very least, required resolution by a factfinder after a hearing.

Within one week, without holding a hearing or receiving any evidence concerning the factual disputes raised in the papers, and without addressing most of the federal constitutional arguments raised by Mr. Arthur, the Circuit Court granted the State's motion to dismiss the Rule 32 petition as untimely, adopting wholesale the State's proposed findings of fact and conclusions of law. (A1-7) The Circuit Court held that it could not, under any circumstances, entertain an untimely Rule 32 petition, stating: "this Court does not have the authority to entertain a petition filed beyond the two-year statute of limitations." (A3) Mr. Arthur's motion to reargue the dismissal was denied on April 4, 2001.

Mr. Arthur filed a notice of appeal with the Court of Criminal Appeals and submitted a supporting brief on April 20, 2001, presenting the equitable and constitutional issues

that he had raised with the trial court. (A48-55) Five days later, the Court of Criminal Appeals affirmed the Circuit Court's order dismissing Mr. Arthur's petition in its entirety. The Court of Criminal Appeals agreed with the lower court that the period of limitations prescribed by Rule 32 is "mandatory and jurisdictional," and is not subject to any exceptions. (A12) Assuming, as the lower court had, that the facts surrounding Mr. Arthur's default were as the State had presented them, the court further concluded that even if there were an equitable exception to the statute of limitations, the exception would not apply in this case. (A13-14)

Like the Circuit Court, the Court of Criminal Appeals disregarded most of Mr. Arthur's claims that the application of the statutory deadline was unconstitutional under the circumstances. The only constitutional argument that either court substantively addressed was Mr. Arthur's claim that failing to consider his petition effectively would result in the suspension of the writ of habeas corpus, in violation of both the U.S. and Alabama Constitutions. (A4-5, A14) Neither court discussed Mr. Arthur's claims under the Sixth, Eighth, and Fourteenth Amendments. On November 2, 2001, the Alabama Supreme Court denied Mr. Arthur's petition for a writ of certiorari. (A16)

On March 23, 2001, while Mr. Arthur's Rule 32 petition was still wending its way through the Alabama courts, the Alabama Supreme Court fixed the date of Mr. Arthur's execution as April 27, 2001. On April 20, 2001, one week before the execution date, Mr. Arthur filed a petition in the United States District Court for the Northern District of Alabama for a writ of habeas corpus. The State responded three days later, arguing, among other things, that all of Mr. Arthur's claims should be dismissed on the grounds that (i) the federal habeas petition was untimely, and (ii) Mr. Arthur had failed to exhaust his state remedies, as

required by 28 U.S.C. § 2254(b)(1)(A). The district court, which granted a stay of execution on April 25, 2001, has stayed the federal habeas proceedings pending resolution of Mr. Arthur's state postconviction proceedings.

If the decision below is not reversed, Mr. Arthur will become the first inmate to be unwillingly executed without *any* substantive collateral review of his conviction or death sentence. For the reasons discussed below, such an outcome would be inconsistent with basic principles of due process, fundamental fairness, and equal protection, as well as with the Eighth Amendment.

Reasons for Granting the Petition

I.

Alabama's Application of Its Postconviction Statute of Limitations Against Petitioner Violated Due Process and Fundamental Fairness.

Alabama is the only jurisdiction that imposes the death penalty but neither automatically provides counsel to indigent death row inmates in postconviction proceedings, nor makes equitable exceptions for petitions filed after the limitations period.[3] Alabama does not fund nongovernmental organizations that provide counsel to death row inmates. Alabama does not make available to its capital defendants any form of legal assistance, or adequate law library facilities. Moreover, in this case, the State failed to provide Mr. Arthur with any notice, much less adequate notice, that the statute of limitations had begun to run.

---

[3] Alabama makes two very limited statutory "exceptions" to the period of limitations for filing a Rule 32 petition: 1) for jurisdictional defects, and 2) for newly discovered material evidence. *See* Ala. R. Crim. P. 32.2(c).

By applying the limitations period against Mr. Arthur, Alabama seeks to execute an indigent inmate who will have had no state collateral review of his death sentence. Such a stringent application of Rule 32 under these circumstances is fundamentally unfair and deprives Mr. Arthur of a meaningful opportunity to raise his constitutional claims, in violation of the Due Process Clause of the Fourteenth Amendment.

Rule 32 of the Rules of Criminal Procedure governs Alabama's postconviction proceedings. It provides in part that a court "shall not entertain any petition for relief from a conviction or sentence" on certain grounds, including federal and state constitutional violations, unless the petition is filed within two years after the issuance of a certificate of judgment by the Court of Criminal Appeals. *See* Ala. R. Crim. P. 32.2(c). As the Alabama Court of Criminal Appeals clearly stated in affirming the dismissal of Mr. Arthur's petition, this two-year limitations period is "mandatory, not permissive," and cannot be excused. (A13)

Alabama's Rule 32 scheme permits discretionary appointment of counsel, but a petitioner must first survive summary dismissal. To do so, the petition must include "full disclosure of the factual basis" of the claims. *See* Ala. R. Crim. P. 32.6(b). There is no allowance for an indigent inmate who lacks resources to research either the law or the facts.

As this Court has recognized, state postconviction proceedings are subject to due process protections. "[W]hen a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause." *Evitts* v. *Lucey*, 469 U.S. 387, 401 (1985). *See also Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 293 (1998) (Stevens, J., concurring in

part and dissenting in part). Though states "may erect reasonable procedural requirements for triggering the right to an adjudication," such as a statute of limitations, states must provide due process when they terminate a claim for failure to comply with such requirements. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (per curiam). These requirements "are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Id.* at 432 (citing *Vitek* v. *Jones*, 445 U.S. 480, 488 (1980)).

There is no dispute in this case that the State completely denied Mr. Arthur access to the process of postconviction review. The deprivation began with the lack of notice. An "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). This opportunity must be "granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Logan*, 455 U.S. at 437 (internal quotation marks and citations omitted). Here, Mr. Arthur never received notice that the statute of limitations for filing a Rule 32 petition had begun to run on April 7, 1998, because the State never sent him a copy of the certificate of judgment and he was not represented by counsel at the time the certificate issued.

The deprivation continued with the conclusive effect Alabama gave to the consequences of the lack of notice. Alabama's refusal to recognize any equitable exceptions to its statute of limitations in this capital case, or to provide any other opportunity for a court to review Mr. Arthur's

constitutional claims on the merits, meant that there was no judicial consideration of the substance of those claims.

The issue logically compelled by these facts is whether Alabama's failure to allow Mr. Arthur to present his claims was consistent with due process. A constitutional due process analysis requires a two-part inquiry: whether the interest at stake is a protected interest, and if so, what process is due in a particular context. *See Logan*, 455 U.S. at 428. As to the first question, there can be no doubt that the interest at stake here – Mr. Arthur's access to Alabama's postconviction procedures to try to overturn his conviction and death sentence – is protected. *Cf. Woodard*, 523 U.S. at 291 (Stevens, J., concurring in part and dissenting in part) (stating that "there is no room for legitimate debate about whether a living person has a constitutionally protected interest in life"). In answering the second question, the "specific dictates of due process generally require consideration of three distinct factors." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). These factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the proceedings used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional substitute procedural requirement would entail.

Id.

In this case, the private interest involved is Mr. Arthur's life. He seeks to avail himself of Alabama's postconviction proceedings so that he can demonstrate that his trial and sentencing hearing did not comport with constitutional requirements, and more importantly, that he is innocent and

does not deserve to be executed. As this Court has recognized, the "private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." *Ake* v. *Oklahoma*, 470 U.S. 68, 78 (1985).

Recognizing the significance of the interests at stake in a case like this, "[t]he Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Barefoot* v. *Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting). *See also Williams* v. *Georgia*, 349 U.S. 375, 391 (1955) ("The difference between capital cases and other cases is the basis of differentiation in law in diverse ways in which the distinction becomes relevant."); *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."); *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980) ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination . . . and of the guilt determination.").

The second factor, the risk that an erroneous deprivation of a protected interest will occur, is also significant here. In his Rule 32 petition, Mr. Arthur raises a number of state and federal constitutional claims, including some that as a practical matter could not have been raised before. Absent relief, there is a grave risk that Mr. Arthur will be executed despite his claims of innocence and despite the fact that he was convicted and sentenced to death in constitutionally deficient proceedings. State postconviction proceedings are an important safeguard against such injustices and have become a vital part of the mechanism that ensures the reliability of a capital trial. In the absence of these

proceedings, the reliability of the death penalty is greatly diminished.[4]

Finally, to be weighed against Mr. Arthur's interests are the state's interests. While Alabama has a legitimate interest in enforcing its postconviction deadline, it also has "a profound interest in assuring that its ultimate sanction is not erroneously imposed." *Ake*, 470 U.S. at 83-84. By strictly enforcing the statute of limitations for filing Rule 32 petitions, Alabama is promoting the interest of the former at the expense of the latter. Even a state's interest in finality cannot justify a categorical rule that denies review of an untimely Rule 32 petition in these circumstances. This Court has found due process violations when a state's rigid application of its procedural rules resulted in fundamental unfairness or frustrated the exercise of a federal right. *See, e.g., Logan*, 455 U.S. at 422; *Green* v. *Georgia*, 442 U.S. 95 (1979); *Reece* v. *Georgia*, 350 U.S. 85 (1955). Without any safeguards to protect against the unfair application of the procedural deadline, Alabama's interest in finality must give way to the uniquely compelling interest in accurate dispositions in capital cases like this one.

In evaluating the potential burden that any additional procedural protections will impose on a state, a relevant consideration is whether other states afford similar protections. In *Ake*, for example, the Court held that an indigent criminal defendant is entitled to psychiatric assistance when sanity is at issue. *See* 470 U.S. at 78-79. The Court emphasized that many states, as well as the federal

---

[4] If the Alabama courts do not address them, these claims may never be examined at all. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner in federal habeas corpus proceedings may not raise any claims unless they were first presented in state proceedings, except in very limited circumstances. *See* 28 U.S.C. § 2254.

government, made such assistance available, thereby rejecting Oklahoma's argument that such a requirement would be unduly burdensome. *See id.* In the same way, Alabama's stringent enforcement of its postconviction filing deadline and its absolute refusal to address Mr. Arthur's constitutional claims are directly at odds with the laws and practices in every other jurisdiction that imposes the death penalty.

Of the 38 jurisdictions that impose the death penalty (including the federal government),[5] 25 appoint counsel to indigent death row inmates in postconviction proceedings upon request.[6] Of the twelve states that do not provide counsel or provide counsel on a discretionary basis, five (Georgia, Kansas, Nebraska, New Mexico, and South Dakota) do not have a limitations period for filing postconviction petitions,[7] and six (Delaware, Illinois,

---

[5] This does not include New Hampshire, which has not imposed the death penalty since 1976, even though the State's laws permit it.

[6] *See* Ariz. R. Crim. P. 32.4; Ark. R. Crim. P. 37.5; Cal. Gov't Code § 68662 (2001); Colo. Rev. Stat. § 16-12-205 (2001); Conn. Gen. Stat. § 51-296 (2001); Fla. Stat. Ch. § 27.702 (2001); Idaho Crim. R. 44.2; Ind. R. Crim. P. 24; La. Rev. Stat. § 15:149.1 (2001); Md. Code Ann. Crim. P. § 7-108 (2001); Miss. Code. Ann. § 99-39-23 (2001); Mont. Code Ann. § 46-21-201 (2001); N.J. Stat. Ann. § 2a:158A-5 (2001); N.Y. C.L.S. Jud. Law § 35-b (2000); N.C. Gen. Stat. § 7A-451 (2000); Ohio Rev. Code Ann. § 2953.21 (2001); Okla. Stat. tit. 22, § 1089 (2000); Pa. R. Crim. P. 1504; S.C. Code Ann. § 17-27-160 (2000); Tenn. Code Ann. § 40-30-306 (2001); Tex. Code Crim. Proc. § 11.071 (2000); Utah Code Ann. § 78-35a-202 (2001); Va. Code Ann. § 19.2-163.7 (2001); Wash. Rev. Code § 10.73.150 (2001); 21 U.S.C. § 848(q) (2001).

[7] *See Montgomery* v. *Tremblay*, 292 S.E.2d 64 (Ga. 1982); Kan. Stat. Ann. § 60-1507 (2000); Neb. Rev. Stat. § 29-3001 (2001); N.M. Stat. Ann. § 31-11-6 (2001); S.D. Codified Laws § 21-27-3.1 (2001).

Kentucky, Missouri, Nevada, and Oregon) make equitable exceptions to their rules or provide other avenues for review, either expressly by statute or as the result of judicial decision.[8] One other state (Wyoming) already has provided publicly-funded counsel to both its death row inmates. This leaves Alabama as the *only* death penalty state that subjects its death row inmates to the following combination of conditions with respect to state postconviction proceedings: (1) no mandatory appointment of counsel; (2) two-year statute of limitations; and (3) no equitable exceptions to this limitations period or other opportunities to raise claims.

Alabama's application of its postconviction deadline is even less defensible when compared to states that automatically appoint postconviction counsel in capital cases. In addition to the procedural safeguard of counsel, many of these states recognize equitable exceptions to their statutes of limitations. California, Texas, and Utah for example, recognize a "good cause" or "interests of justice" exception.[9] Louisiana allows for the review of an untimely petition if "the person asserting the claim has been sentenced to death." La. C. Cr. P. Art. 930.8. This has not proved any impediment to Louisiana's enforcement of its laws: it has executed more people since 1976 than Alabama has. And a recent judicial decision in Arkansas, a state that provides counsel in capital cases upon request, starkly demonstrates how unreasonable Alabama's scheme is. In *Jackson* v. *State of Arkansas*, 37 S.W.3d 595 (Ark. 2001), the Arkansas Supreme Court found that although the state's

---

[8] *See* Del. Super. Ct. Crim. R. 61(i); 725 Ill. Comp. Stat. 5/122-1 (2001); Ky. Civ. R. 60.02; Mo. S. Ct. R. 91.02; Nev. Rev. Stat. Ann. 34.726 (2001); *Fine* v. *Zenon*, 834 P.2d 509 (Or. Ct. App. 1992).

[9] *See* Cal. R. Ct. App. R. 3(1-2); Tex. Code Crim. § 11.071 (2000); Utah Code Ann. § 78-35a-202 (2001).

postconviction limitations period is jurisdictional in non-capital cases, "due process requirements of fundamental fairness" require a court to address untimely collateral petitions on their merits in death penalty cases under certain circumstances.

Like these states, the federal courts also have recognized that the statute of limitations in postconviction proceedings must not be strictly enforced against petitioners who can show that they made diligent efforts to file timely their petitions, but were unable to do so because of extraordinary circumstances. In particular, the federal courts of appeal have uniformly held that the one-year statute of limitations for filing a federal habeas corpus petition, 28 U.S.C. § 2244(d), is subject to equitable tolling[10] "when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *Sandvik* v. *United States*, 177 F.3d 1269, 1270-71 (11th Cir. 1999).[11]

---

[10] Equitable tolling applies when basic principles of fairness preclude the rigid application of a limitations period. To have an untimely petition heard in spite of the late filing, a petitioner must show either (1) that the respondent has actively misled the petitioner, or (2) that the petitioner has been prevented from asserting his rights in some extraordinary way. *See Jones* v. *Morton*, 195 F.3d 153, 159 (3d Cir. 1999).

[11] *See also Wyzykowski* v. *Department of Corrections*, 226 F.3d 1213, 1216 (11th Cir. 2000); *Smith* v. *McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Fahy* v. *Horn*, 240 F.3d 239 (3d Cir. 2001); *Harris* v. *Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000); *Davis* v. *Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *Dunlap* v. *United States*, 250 F.3d 1001 (6th Cir. 2001); *Calderon* v. *United States Dist. Ct.*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc); *Kreutzer* v. *Bowersox*, 231 F.3d 460 (8th Cir. 2000); *Miller* v. *Marr*, 141 F.3d 976, 978 (10th Cir. 1998).

Although extraordinary circumstances generally are required under federal law for equitable tolling, at least one federal court of appeals has acknowledged that in capital cases, due process requires a somewhat lower standard. In *Fahy* v. *Horn* 240 F.3d 239 (3d Cir.), *cert. denied*, 122 S. Ct. 70 (2001), the Third Circuit tolled the federal habeas statute of limitations and excused the untimely postconviction filing by a petitioner who, unlike Mr. Arthur, was represented by counsel. The court explained:

> [I]f the limitation period is not tolled in this case, [petitioner] will be denied all federal review of his claims. Here the penalty is death, and courts must consider the ever-changing complexities of the relevant provisions [petitioner] attempted to navigate. Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than "extraordinary" circumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair.

Id. at 245.

The deadline exceptions and procedural safeguards in these other jurisdictions embody the flexibility that is the hallmark of due process. "[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . Due process is flexible and calls for such procedural protections as the particular situation demands." *Eldridge*, 424 U.S. at 334 (internal quotation marks and citations omitted).

Mr. Arthur, who at the time of his default was not represented by counsel, did not have any legal assistance or access to adequate law library facilities, and was never served by the State with the certificate of judgment. He

could not reasonably have been expected to ascertain when the two-year statute of limitations under Rule 32 would run. Under these circumstances, due process requires that the untimeliness of Mr. Arthur's Rule 32 petition be excused and that his petition be reviewed on the merits. It is only through a thorough evaluation of collateral claims that finality in capital litigation can be justly achieved. A balance must be struck between "the need for finality in death penalty cases with the requirement that a defendant have a fair examination of his claims." S. 1760, 101st Cong., 135 Cong. Rec. 13480 (1989) (enacted) (statement of Sen. Thurmond introducing a bill to amend Title 28, United States Code, to provide special habeas corpus procedures in capital cases).

II.

Alabama's Failure to Provide Counsel to Petitioner in Connection with State Postconviction Proceedings Violated the Sixth and Fourteenth Amendments.

One of the claims Mr. Arthur has attempted to raise in his Rule 32 petition is that trial and appellate counsel provided constitutionally ineffective assistance: among other deficiencies, trial counsel failed to undertake even a minimal effort to investigate the case against Mr. Arthur, and also failed to investigate and present any mitigation evidence at the sentencing phase of the trial. The state postconviction proceeding is Mr. Arthur's first real opportunity to present his claims concerning the effectiveness of either trial or appellate counsel.[12] Mr.

---

[12] Technically, a claim for ineffective assistance of trial counsel can be raised in a motion for new trial. Such a petition "must be filed not later than thirty (30) days after sentence is pronounced." Ala. R. Crim. P. 24.1(b). If it is not included in a timely motion for new trial, an ineffectiveness claim cannot be raised until Rule 32

Arthur's rights to trial and appellate counsel would be rendered nullities if he were denied the opportunity to raise claims of ineffective assistance solely because of his poverty; fundamental fairness and equal protection required that he be provided with counsel to investigate these claims and prepare a meaningful postconviction filing.

The highest courts in Mississippi and Georgia recently considered whether a federal constitutional right to counsel exists in state postconviction proceedings when such proceedings are the first opportunity for capital defendants to raise certain claims; the two courts reached opposite conclusions. *Compare Jackson* v. *Mississippi*, 732 So. 2d 187 (Miss. 1999) (recognizing a constitutional right to counsel for capital defendants in state postconviction proceedings), *with Gibson* v. *Turpin*, 513 S.E.2d 186 (Ga. 1999) (finding no constitutional right to counsel for capital defendants in state postconviction proceedings). Mr. Arthur urges the Court to grant the writ and resolve this conflict. Specifically, Mr. Arthur urges the Court to acknowledge that a capital defendant's rights to effective trial and appellate counsel cannot be effectively protected other than through postconviction review, when different counsel act for him, and that denial of access to collateral review is therefore tantamount to denial of the rights.

Almost 40 years ago, this Court recognized that the Constitution requires states to provide counsel to indigent criminal defendants at trial and in their direct appeal. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Douglas* v.

---

postconviction proceedings. *See Ex Parte Ingram*, 675 So. 2d 863, 866 (Ala. 1996). As a practical matter, therefore, the only way a criminal defendant in Alabama can raise an ineffective assistance of trial counsel claim before postconviction proceedings is if new appellate counsel is appointed immediately after trial. This did not happen in Mr. Arthur's case.

California, 372 U.S. 353 (1963); *see also Griffin* v. *Illinois*, 351 U.S. 12 (1956). These requirements are rooted in the fundamental Sixth Amendment right to counsel and the Fourteenth Amendment rights to due process and equal protection. *See M.L.B.* v. *S.L.J.*, 519 U.S. 102, 120 (1996) (observing that the Court's decision in cases stemming from *Griffin* "reflect both equal protection and due process concerns"). Both *Gideon* and *Douglas* recognized that the Constitution forbids states to deny indigent criminal defendants the fundamental right to counsel solely on the basis of their poverty. *See Gideon*, 372 U.S. at 338-39; *Douglas*, 372 U.S. at 355. The right to counsel includes the right to effective counsel. *See Evitts* v. *Lucey*, 469 U.S. 387 (1985).

In *Ross* v. *Moffitt*, 417 U.S. 600 (1974), the Court considered how far the concept of equal justice for criminal defendants should extend, and rejected the argument that states were constitutionally required to provide indigent criminal defendants with counsel to pursue discretionary appellate review. The Court reasoned that the failure to appoint counsel to indigent defendants at this stage of the criminal proceedings did not have the same discriminatory impact as at the trial and direct appeal stages. *See id.* at 601. Relying on the logic of *Moffitt*, the Court later held that neither fundamental fairness nor equal protection requires that an indigent defendant be provided with counsel when seeking state postconviction relief. *See Pennsylvania* v. *Finley*, 481 U.S. 551 (1987). Significantly, the Court in *Finley* observed that collateral proceedings are "even further removed from the criminal trial than is discretionary review," *id.* at 556-57, and that the rationales underlying the *Moffitt* decision "apply with even more force to postconviction review." *Id.* at 556.[13]

---

[13] Two years later, in *Murray* v. *Giarratano*, 492 U.S. 1 (1989), a plurality of the Court concluded that *Finley* applied in the context

In *Coleman* v. *Thompson*, 501 U.S. 722 (1991), the Court concluded that a federal habeas petitioner in a capital case cannot raise a claim that his appellate counsel in state postconviction proceedings was ineffective. In that case, a federal habeas petitioner sought to overcome his state procedural default by arguing that his postconviction appellate lawyer was ineffective for having failed to file a timely notice of appeal. *See id.* at 755. In rejecting the petitioner's argument, the Court relied on the fact that the petitioner's claims of ineffective assistance of trial and direct appellate counsel, which were raised for the first time in state habeas, already had been presented to a state court by competent counsel. *See id.* Accordingly, the only issue before the Court in *Coleman* was whether the petitioner had a constitutional right to counsel at the appellate stage of state postconviction proceedings. The Court expressly left open the question whether a constitutional right to counsel exists in postconviction proceedings that are the first opportunity for a capital defendant to raise a claim of ineffective assistance of trial or appellate counsel. *See id.* at 755-56. *See also Daniels* v. *United States*, 121 S. Ct. 1578, 1586 (2001) (Scalia, J., concurring in part).

Mr. Arthur's case falls squarely in the gap left between *Gideon* and *Douglas*, on the one hand, and *Coleman* on the other. Here, solely because he lacked the resources to retain postconviction counsel, Mr. Arthur is being denied any meaningful opportunity to raise his claims that trial and appellate counsel were ineffective. The reasoning underlying the Court's refusal to extend the right to counsel to discretionary appeals and to state postconviction appeals is not persuasive in these circumstances. In *Moffitt*, *Finley*,

---

of capital cases, but a majority of the Court failed to reach agreement as to *Finley's* actual application in capital cases. *See infra* at 26 n.15.

and *Coleman*, the Court relied on the fact that the petitioners already had a meaningful opportunity to raise their claims in appropriate forums. The situation here is markedly different. Mr. Arthur has never had a meaningful opportunity to raise his claims that trial and appellate counsel were ineffective, and no court has reviewed those claims.

Further, previous proceedings have not provided Mr. Arthur with a roadmap for raising these claims. Unlike filing a petition for discretionary appeal, a claim for ineffective assistance of counsel is completely new. Given the complexity of the law, the need for investigation, research and analysis of counsel's performance, and the isolation and limited resources of inmates who have been sentenced to death, it is practically impossible for any capital defendant to craft a meaningful claim of ineffective assistance of trial or appellate counsel without the assistance of postconviction counsel. As the Court already has recognized, a significant difference exists between the amount of work that goes into filing a petition for discretionary review, and the amount of work necessary to raise an entirely new claim of constitutionally ineffective assistance of counsel. *See Bounds* v. *Smith*, 430 U.S. 817, 828 (1977) ("The need for new legal research or advice to make a meaningful initial presentation to a trial court in [an original action] is far greater than is required to file an adequate petition for discretionary review."). This is particularly true in death penalty cases, which are by their nature factually and legally more complicated than non-capital cases.

Though state postconviction proceedings are technically civil in nature, there can be no doubt that collateral attacks on convictions and sentences in capital cases have become an integral part of the death penalty appellate process. *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring). *See also Jackson*, 732 So. 2d at 190 ("The reality is that post-conviction

efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level."). As such, state postconviction proceedings even more closely resemble – in both content and purpose – actual criminal proceedings than do the "quasi criminal in nature" termination of parental rights proceedings at issue in *M.L.B.*, 519 U.S. at 124. Indeed, the rules governing postconviction proceedings are found in Alabama's Rules of *Criminal* Procedure. Moreover, as the Mississippi Supreme Court remarked in *Jackson*, "The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas." *Jackson*, 732 So. 2d at 190.[14]

By failing to provide Mr. Arthur with counsel for his initial postconviction proceeding, the State of Alabama denied Mr. Arthur any meaningful opportunity to enforce his rights to effective assistance of trial and appellate counsel. Alabama's discriminatory deprivation of any mechanism to enforce these rights should be held unconstitutional, and Mr. Arthur's untimely filing of his Rule 32 petition should therefore be excused.

---

[14] A number of federal courts of appeals have rejected right to counsel claims based on *Coleman*, but it is important to note that in none of these cases was the court presented with the precise issue before this Court. *See, e.g., Mackall* v. *Angelone*, 131 F.3d 442 (4th Cir. 1997) (en banc); *Martinez* v. *Johnson*, 255 F.3d 229 (5th Cir. 2001); *Nolan* v. *Armontrout*, 973 F.2d 615 (8th Cir. 1992); *Bonin* v. *Calderon*, 77 F.3d 1155 (9th Cir. 1996); *Parkhurst* v. *Shillinger*, 128 F.3d 1366 (10th Cir. 1997); *Hill* v. *Jones*, 81 F.3d 1015 (11th Cir. 1996). Significantly, none of them involved a petitioner under sentence of death entirely deprived of any counsel in state postconviction proceedings.

III.

Alabama's Failure to Provide Counsel or Any Legal Assistance to Petitioner Violated the Eighth and Fourteenth Amendments.

As this Court has recognized, the Constitution requires that states provide inmates with meaningful access to the courts for purposes of pursuing state postconviction relief. *See Bounds* v. *Smith*, 430 U.S. 817, 828 (1977); *Lewis* v. *Casey*, 518 U.S. 343, 350 (1996). Regardless of whether a law library alone might give certain inmates sufficient information to permit them to make meaningful use of court processes, inmates under sentence of death are not given access to collateral review processes by having such resources made available to them. Not only are death row inmates more isolated and less able to rely on assistance from their fellow inmates, but in attempting to make collateral attacks on their convictions and sentences in state postconviction proceedings, they are confronted by many complex and difficult areas of law. Without at least the assistance of a person educated in the law, it is practically impossible for a death row inmate to draft and file a meaningful postconviction petition.

Alabama may seek to justify its position on the basis that some version of a library was made available to Mr. Arthur, even though as noted, the library was not a functional one. But the existence of the library is only the beginning of the analysis. *Bounds* did not "create an abstract, free standing right to a law library or legal assistance." *Casey*, 518 U.S. at 351, 356. Rather, *Bounds* and its progeny instruct that the constitutionality of a state's scheme depends on whether it provides inmates with "[t]he tools[] that the inmates need in order to attack their sentences, directly or collaterally." *Id.* at 355.

As Justice Scalia explained in *Casey, Bounds* guarantees "the conferral of the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Id.* at 356. A law library in and of itself cannot be enough if it does not confer on indigent death row inmates the capability of challenging their confinement through a state postconviction petition. And "it is that capability, rather than the capability of turning pages in a law library, that is the touchstone." *Id.* In light of the extraordinary obstacles that Alabama death row inmates must overcome to file a postconviction petition, merely providing a law library fails to ensure that these inmates will be able to avail themselves of the state court's process in any meaningful way.

Nor can Alabama defend on the basis that the collateral review proceedings do not require legal sophistication. The need for the aid of counsel or some legal assistance in preparing a postconviction petition is evident even in Alabama's rules governing the filing of such documents. These rules provide that a petition must disclose in a clear and specific statement the grounds of relief sought, including full disclosure of the factual basis of those grounds. *See* Ala. R. Crim. P. 32.6(b). Petitions that do not meet these stringent criteria, including those brought by an indigent inmate with no counsel or legal assistance, will be dismissed summarily. *See* Ala. R. Crim. P. 32.7(d). *See also Ex parte Boatwright*, 471 So. 2d 1257, 1258 (Ala. 1985). These challenges are magnified in capital cases by the need to take account of federal law as well. "[T]he complexity of [the Court's] jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring). To have meaningful access to the courts, death row inmates seeking state postconviction

review must be provided with counsel or, at the very least, some form of legal assistance.[15]

It is of no consequence that in limited circumstances Alabama courts may provide petitioners with counsel because this assistance, if it comes at all, comes too late. As the Court noted in *Bounds*, it is "irrelevant that [a state] authorizes the expenditure of funds for appointment of counsel in some state postconviction proceedings for prisoners whose claims survive initial review by the courts."

---

[15] The question whether inmates in capital cases require the assistance of counsel to have meaningful access to state postconviction proceedings has not finally been resolved by this Court. No majority of the Court coalesced in *Giarratano*. Thus, the grounds for decision in that case are limited to those expressed in Justice Kennedy's concurring opinion (in which Justice O'Connor joined). *See Marks* v. *United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'") (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)).

In his concurring opinion in *Giarratano*, Justice Kennedy voiced concern about the difficulties that face death row inmates in pursuing postconviction relief without appointed counsel. *See Giarratano*, 492 U.S. at 14-15. In that case, the hardships were lessened by the fact that "Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief." *Id.* More importantly, however, "no prisoner on death row in Virginia ha[d] been unable to obtain counsel to represent him in postconviction proceedings." *Id.* In other words, like the plaintiffs in *Casey*, the plaintiffs in *Giarratano* had suffered no actual injury as a result of the state's failure to appoint counsel. As Mr. Arthur's case plainly shows, the same cannot be said for him, or for Alabama's prison system or postconviction scheme.

Bounds, 430 U.S. at 828. The "main concern" is to "protect[] the ability of an inmate *to prepare* a petition or complaint." *Id.* (emphasis supplied).

When Mr. Arthur was deprived of meaningful access to the courts because of the lack of counsel or legal assistance, he suffered injury that is both actual and severe. *See Casey*, 518 U.S. at 349. Because he was unable to prepare a petition for state postconviction review within the two-year deadline, he is now time-barred and facing execution. He also faces a presumption that his claims should not be heard in federal court because they have been procedurally defaulted in state court. This harm is squarely within the injury recognized by the Court in *Casey*:

> When any inmate . . . shows that an actionable claim of its nature which he desired to bring has been lost or rejected, or that the presentation of such claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish 'adequate law libraries or adequate assistance from persons trained in the law.'

Id. at 356 (quoting *Bounds*, 430 U.S. at 828).

In addition to violating Mr. Arthur's right of meaningful access to the courts, Alabama's failure to provide counsel or legal assistance to death row inmates to prepare postconviction proceedings runs counter to the Eighth Amendment. This Court has held that a determination of Eighth Amendment requirements will rest on whether there appears to be a national consensus evidencing "the evolving standards that mark the progress of a maturing society." *Stanford* v. *Kentucky*, 492 U.S. 361, 369-70, (1989) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101, (1958) (plurality opinion)). The most important indicia of whether there is a national consensus to show shifting standards are "statutes passed by

society's elected representatives." *Id.* at 370. *See also Gregg* v. *Georgia*, 428 U.S. 153, 174 n.19 (1976).

A review of relevant statutes in jurisdictions that impose the death penalty confirms the existence of a national consensus that it is manifestly unjust to execute an indigent inmate without providing him with at least legal assistance to pursue state postconviction remedies. Indeed, only Alabama does not provide any postconviction counsel or other legal assistance upon request to death row inmates. In all other death penalty jurisdictions, either a state-funded public defender system ensures that indigent death row inmates receive access to counsel, or state-funded agencies themselves provide legal representation or legal assistance to death row inmates for collateral review procedures.[16]

That so many jurisdictions provide counsel or legal assistance for capital postconviction proceedings reflects the common understanding that these proceedings are a vital safeguard to the reliability of capital punishment. This must be especially so in a case such as this, where state postconviction review offers the only meaningful opportunity to raise claims Mr. Arthur advances, such as his claims of ineffective trial and appellate counsel. The risk that an inmate will be executed without receiving any state collateral review only because he was too poor to afford legal counsel and the state did not provide any legal assistance is a risk that "cannot be tolerated in a case in which the defendant's life is at stake." *Beck* v. *Alabama*, 447 U.S. 625, 637 (1980). *See also Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978).

---

[16] *See, e.g.*, Cal. Gov't Code § 68661 (2001); Fla. Stat. Ch. § 27.702 (2001); 725 Ill. Comp. Stat. 5/122-4 (2001); Miss. Code Ann. § 99-39-23 (2001); N.C. Gen. Stat. Ann. § 7A-486.3 (2001); Okla. Stat. tit. 22, § 1089 (2001); Tenn. Code. Ann. § 40-30-301 *et seq.* (2001).

Conclusion

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the decision of the Alabama Court of Criminal Appeals with respect to the questions presented herein.

Respectfully submitted,

Theresa Trzaskoma
Heiner Braun
Suhana S. Han
Katherine Richardson
125 Broad Street
New York, New York 10004
(212) 558-4000

Russell Neufeld
Counsel of Record
Arnold J. Levine
E. Niki Warin
c/o Legal Aid Society
49 Thomas Street
New York, New York 10013
(212) 298-5116

January 31, 2002

APPENDIX

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

THOMAS D. ARTHUR,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. CC-87-577
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

ORDER

This case is before the court on Thomas Arthur's Motion To File An Out Of Time Petition For Relief From Judgment, Arthur's Petition For Relief From Judgment Pursuant To Rule 32, *Alabama Rules of Criminal Procedure*, and the State of Alabama's Motion To Dismiss The Petition As Untimely Filed, along with exhibits filed by the State in support of its Motion. Upon review of these pleadings, the Court is of the opinion that Arthur's petition is precluded by the two-year statute of limitation of Rule 32.2(c) and the State's Motion To Dismiss is due to be granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Thomas Arthur was indicted by the Colbert County Grand Jury and charged with the capital murder of Troy Wicker. Arthur's first conviction was reversed on appeal. *Ex Parte Arthur*, 472 So. 2d 665 (Ala. 1985). Following his first reversal, his case was moved to Jefferson County based on Arthur's request for a change of venue because of pretrial publicity. Arthur was convicted a second time and, again, his conviction was reversed on appeal. *Arthur* v. *State*, 575 So. 2d 1165 (Ala. Crim. App. 1990).

Arthur's third trial occurred December 2-5, 1991. The undersigned judge presided over this trial. Arthur was again convicted by a jury. The jury recommended, during the penalty phase of the trial, that Arthur be sentenced to death. The jury's vote was 11-1 in favor of death. On January 24, 1992, after appropriate consideration as required by law of the existing mitigating and aggravating circumstances, this Court sentenced Arthur to death by electrocution.

Arthur's sentence was affirmed by both the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *Arthur* v. *State*, 711 So. 2d 1031 (Ala. Crim. App. 1996); *Ex Parte Arthur*, 711 So. 3d. 1097 (Ala. 1997). As shown by the exhibits filed by the State in support of its Motion to Dismiss, the Alabama Supreme Court denied Arthur's Application For Rehearing on March 20, 1998 (State's Exhibit A) and the Court of Criminal Appeals issued a certificate of judgment on April 7, 1998. (State's Exhibit B) Arthur admits in his petition that he never sought certiorari review in the United States Supreme Court. (Petition, p. 2, fn. 3)

Arthur filed his Rule 32 petition and his accompanying Motion To File An Out Of Time Petition on January 26,2001. Rule 32.2(c), *Alabama Rules of Criminal Procedure*, requires a Rule 32 petition to be filed within two years after the issuance of the certificate of judgment by the

Court of Criminal Appeals. The statute of limitation for Arthur to file a Rule 32 petition expired on April 7, 2000. Arthur's petition was filed over nine and a half months after the expiration of the statute of limitation.

Arthur contends that good cause exists to excuse his late filing of his Rule 32 petition. This Court finds no such exception within the statute of limitation stated in Rule 32. Rule 32.2(c) specifically states this Court "shall not entertain" a petition that is not filed within the appropriate time. The Alabama Court of Criminal Appeals has held that the statute of limitation is mandatory and jurisdictional. *Williams* v. *State*, No. CR-99-1267, 2000 WL 1603780, at *2 (Ala. Crim. App. Oct. 27, 2000). Because the filing requirement of Rule 32 is jurisdictional, this Court does not have the authority to entertain a petition filed beyond the two-year statute of limitations raising only constitutional grounds. This Court is authorized to summarily dismiss a petition when it is clear on the face of the petition that it is precluded.

Even if the rules allowed for good cause to excuse late filing, the grounds averred by Arthur would, in the opinion of this Court, be insufficient. Arthur contends he did not receive notice of the issuance of the certificate of judgment on direct appeal. The court notes, however, that Arthur acknowledges he was represented by counsel through the conclusion of his direct appeal in the Alabama Supreme Court. (Petition, p. 2, fn. 3) The certificate of judgment was issued pursuant to Rule 41, *Alabama Rules of Appellate Procedure*. Arthur's claimed ignorance because of lack of notice is without merit because his direct appeal counsel would have had notice that the certificate of judgment had been issued.

Arthur also claims his petition was not timely filed because he was unable to obtain legal representation and he considered himself not competent to file a Rule 32 petition.

This is no excuse from the procedural rule of Rule 32.2(c). Rule 32.7(c) allows the trial court, upon reviewing a petition, to determine the validity of the claims and, when appropriate, to appoint counsel to represent the petitioner and to liberally allow amendments to the pleadings. This Court routinely addresses pro se Rule 32 petitions in criminal cases. If Arthur had timely filed his petition, this Court, especially in the light of this case being one in which a death sentence has been imposed, would have given appropriate consideration to the petition. However, Arthur's tardiness precludes this Court from obtaining jurisdiction over any constitutional issues.

Arthur contends that late filings in other cases have been allowed. He states no factual basis nor does he offer any evidence in support of this conclusory allegation. As the court notes above, Rule 32.2(c) has been held by the Alabama Court of Criminal Appeals to be mandatory and jurisdictional and, accordingly, any such filing would be in violation of the holding of the Alabama Court of Criminal Appeals.

It is well established that a criminal defendant has no constitutional right to counsel in a state post-conviction proceeding. *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-557 (1987); *Coleman* v. *Thompson*, 501 U.S. 722, 725 (1991). Arthur's contention that he has a constitutional right to post-conviction counsel and post-conviction review is without legal merit.

Arthur contends that the two-year statute of limitation in Rule 32 is an unconstitutional suspension of the writ of habeas corpus. While in the nature of a writ of habeas corpus, Rule 32 is, in fact, a procedural mechanism for seeking post-conviction relief and is promulgated under the rule making authority of the Alabama Supreme Court. Legal procedures such as Rule 32 are subject to reasonable procedural restrictions without such restrictions being a

suspension of the writ of habeas corpus. *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996). The two-year statute of limitation for raising constitutional claims in post-conviction proceedings is certainly a reasonable restriction and serves the purpose of requiring that constitutional claims be presented in a reasonable time in order to achieve the meaningful result of finality of criminal judgments. Arthur's claim that the Rule 32 statute of limitation violates the suspension clause of the Constitution of the United States and the Constitution of Alabama is without merit.

The statute of limitation stated in Rule 32.2(c) specifically applies to allegations of constitutional error. Claims 2 through 9 of Arthur's Rule 32 petition specifically allege constitutional grounds pursuant to Rule 32.1(a) and, as a result, those claims are filed beyond the Rule 32.2(c) statute of limitation.

Arthur couches his first claim, however, in jurisdictional terms. This Court may consider a claim alleging that the trial court was without jurisdiction, even if that claim is raised beyond the two-year statute of limitation. Rule 32.2(c), Ala.R.Crim.P. Arthur contends that Gary Alverson, the District Attorney for Colbert County who prosecuted his case, had an irreconcilable conflict of interest because of a past attorney-client relationship with Arthur's co-defendant, Judy Wicker. Arthur contends that this conflict deprived this Court of jurisdiction because Mr. Alverson should not have prosecuted the case or even presented the case to the grand jury. Based upon Mr. Alverson's affidavit, (State's Exhibit C) this Court finds the factual allegations of the petition to be without merit.

According to Mr. Alverson's affidavit, he was first contacted by Judy Wicker's daughter, Tina Jenkins, after Wicker's conviction was final on appeal. Arthur's conviction, however, had been reversed and remanded by the Alabama Supreme Court. This contact by Wicker's

daughter was made because Wicker and James A. Patton, the District Attorney at the time, were discussing the possibility that Wicker would truthfully testify at Arthur's retrial. In exchange, Mr. Patton was to inquire of the Alabama Pardons and Parole Board about possibilities for Wicker's parole if she testified. Mr. Alverson's role was to accompany Mr. Patton to a meeting with the parole board to see if Mr. Patton complied with the agreement. After becoming District Attorney in January 1987, Mr. Alverson had his first direct contact with Wicker when he asked her to testify at Arthur's re-trial. None of the information contained in Mr. Alverson's affidavit indicates that Alverson had any conflict of interest in prosecuting Arthur.

More importantly, Arthur's allegations in the first claim of his Rule 32 petition do not even state a jurisdictional claim, even though Arthur labels it as such. Cf., *Sumlin* v. *State*, 710 So. 2d 941, 942 (Ala. Crim. App. 1998) (court ruled that the Rule 32 petitioner's allegations that the trial court did not obtain jurisdiction over him because he was illegally arrested was not a jurisdictional claim and was, therefore, untimely filed pursuant to Rule 32.2(c)). Arthur alleges that the prosecuting attorney had a conflict of interest, and, therefore, the prosecutor's presentation of the case to the grand jury rendered the indictment returned by that grand jury void. Arthur has no factual or legal support for this contention of jurisdictional error. An allegation of conflict of interest may invoke a constitutional claim but it does not render void a validly returned indictment of a grand jury. Arthur offers no legal authority for his claim that the indictment returned in 1991 is void.

Arthur's contention that his first claim raises a jurisdictional defect is without merit. This claim is clearly an allegation of a constitutional violation which, along with the remaining claims of the petition, is barred by Rule 32.2(c).

CONCLUSION

Thomas Arthur's time for timely filing a Rule 32 petition expired on April 7, 2000. Arthur's Rule 32 petition was not filed until January 26, 2001. Despite Arthur's styling of his claims, it is apparent to this Court that all of the allegations raised are allegations of constitutional error. Accordingly, every claim contained in Arthur's petition is subject to the preclusionary aspect of Rule 32.2(c), *Alabama Rules of Criminal Procedure*. This Court is precluded from reviewing Arthur's claims because of the mandatory and jurisdictional nature of the Rule 32 statute of limitation. This Court cannot entertain any late filed petition asserting constitutional grounds. This Court has jurisdiction only to deny and dismiss Arthur's petition with prejudice.

Accordingly, it is ORDERED AND ADJUDGED that Thomas Arthur's Petition For Relief From Judgment filed pursuant to Rule 32, *Alabama Rules of Criminal Procedure*, is denied and the State's Motion to Dismiss the petition is granted because the petition is clearly precluded under the two-year statute of limitation.

DONE AND ORDERED this 14 day of March, 2001.

s/ James H. Hard, IV
JAMES H. HARD, IV
CIRCUIT JUDGE

RELEASED APR 25 2001
CLERK
ALA COURT CRIMINAL APPEALS

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2000-2001

CR -00-1393

Thomas Douglas Arthur

v.

State

Appeal from Jefferson Circuit Court
(CC-87-577.60)

PER CURIAM.[1]

The appellant, Thomas Douglas Arthur, was convicted of murdering Troy Wicker, an offense defined as capital because Arthur had previously been convicted of murder in the second degree in the 20 years prior to murdering Wicker.[2] *See* § 13A-5-40 (a) (13), Ala. Code 1975.

---

[1] Pursuant to § 12-3-17, Ala. Code 1975, Justice Hugh Maddox, Retired Justice of the Alabama Supreme Court, has been appointed as an active member of this Court because three judges of this Court have recused themselves from hearing this case.

[2] Arthur had previously been convicted of the 1977 murder of Eloise Bray West, the sister of his common-law wife. The Alabama Supreme Court detailed the circumstances surrounding this offense in *Ex parte Arthur*, 472 So. 2d 665 (Ala. 1985). Arthur went to West's place of business, inquired about the location of his wife, and when West ordered him to leave the premises and picked up

(continued ...)

The appellant was originally convicted of this offense and sentenced to death, this conviction and sentence having been reversed by the Alabama Supreme Court on April 5, 1985 due to the improper admission of evidence of a prior murder committed by the appellant. *Arthur* v. *State*, 472 So. 2d 665 (Ala. 1985). He was again tried, convicted, and sentenced to death, but the second conviction was also reversed by the Alabama Court of Criminal Appeals on May 25, 1990, due to the absence of the constitutionally necessary predicate for the admission of the appellant's statement into evidence. *Arthur* v. *State*, 575 So. 2d 1165 (Ala.Crim.App. 1990), cert. denied, 575 So. 2d 1191 (Ala. 1991). Thereafter, the appellant was tried for the third time, which conviction and sentence of death are the subject of the present Rule 32 petition. Arthur was allowed the status of co-counsel during this trial. (Arthur, in his postconviction petition, argued that his trial counsel's performance was ineffective because counsel did not object to Arthur acting as co-counsel. This issue was thoroughly addressed by this Court on Arthur's direct appeal.) He personally addressed the jury in closing argument in the penalty phase and asked that the jury sentence him to death. The jury recommended, by a vote of 11 to 1, that Arthur be sentenced to death.[3] The trial court

---

(... continued)

her telephone, Arthur pointed a gun at her and fired three times. West died as a result of a gunshot wound to her right eye.

[3] This court when addressing this issue on direct appeal stated:

> "The appellant ... presented his argument to the jury, requesting that it recommend a death sentence. He set forth all of his reasons for asking the jury to do so: that he needed access to the death row library at Holman Prison; that he did not want to die and was positive he would not be executed, but that he believed he could better fight his
>
> (continued ...)

accepted the jury's recommendation and sentenced him to death by electrocution. Arthur's conviction and sentence were affirmed on direct appeal. See *Arthur* v. *State*, 711 So. 2d 1031 (Ala.Crim.App. 1996) , aff'd, 711 So. 2d 1097 (Ala. 1998) . The facts of this capital offense were detailed in this Court's opinion in *Arthur* v. *State*, 711 So.2d 1031 (Ala.Crim.App. 1996) . On January 25, 2001, Arthur filed a post conviction petition pursuant to Rule 32, Ala.R.Crim.P.. The petition was accompanied by a motion to file an out of time Rule 32 petition. The State moved that the petition be dismissed because it was filed outside the two-year statute of limitations provided in Rule 32.2(c). The Honorable James H. Hard dismissed the Rule 32 petition by order dated March 14, 2001.[4] Arthur filed notice of appeal on April 5, 2001. Arthur filed his brief with this Court after hours on April 20, 2001, and the State filed its brief on April 24, 2001. On March 23, 2001, the Alabama Supreme Court scheduled Arthur to die in Alabama's electric chair on April 27, 2001.

(... continued)

> conviction from death row; that death row inmates have more visitation time; that a death row sentence would result in an automatic appeal with heightened review; that he had asked for a death sentence in each of his prior trials and had been sentenced to death each time, and each case ended in a reversal on appeal; and that his jail cell at Holman Prison had become like home to him. The jury then granted the appellant's request by returning an advisory verdict of death. The appellant then advanced his argument to the trial court again through a letter and subsequently at the final sentencing hearing."

Arthur v. *State*, 711 So. 2d 1031, 1089 (Ala.Crim.App. 1996), *aff'd*, 711 So. 2d 1097 (Ala. 1998).

[4] Judge Hard presided over Arthur's third trial.

Rule 32.7(c), Ala.R.Crim.P., provides that counsel may be appointed once a petition is filed in the circuit court, and Rule 32.7(b), Ala.R.Crim.P., authorizes a petition to be amended at anytime prior to entry of judgment.

Rule 32.2(c), Ala.R.Crim.P., states:

> Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) [constitutional claims] and (f) [failure to appeal within proscribed time], unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within two (2) years after the issuance, of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala.R.App.P....

Arthur appealed his conviction to this Court and the certificate of judgment was issued on April 7, 1998. This Rule 32 petition was not filed until January 25, 2001 – nearly three years after the certificate was issued.

The trial court when denying post conviction relief stated, in part:[5]

> Thomas Arthur's time for timely filing a Rule 32 petition expired on April 7, 2000. Arthur's Rule 32 petition was not filed until January 26, 2001. Despite Arthur's styling of his claims, it is apparent to this Court that all of the allegations raised are allegations of constitutional error. Accordingly, every claim contained in Arthur's petition is subject to the

---

[5] Rule 32.7(d) allows a trial court to summarily dismiss a petition that is procedurally barred.

> preclusionary aspect of Rule 32.2(c), Alabama Rules of Criminal Procedure. This Court is precluded from reviewing Arthur's claims because of the mandatory and jurisdictional nature of the Rule 32 statute of limitation. This Court cannot entertain any late filed petition asserting constitutional grounds.

We agree with the trial court. We have held that the two year statute of limitations in Rule 32.2(c), Ala.R.Crim.P., is mandatory and jurisdictional. *See Williams* v. *State*, [Ms. CR-1267, October 27, 2000] __ So.2d __ (Ala.Crim.App. 2000). All of the issues raised in the petition are claims that challenge his conviction based on alleged constitutional violations and alleged defects in his trial. These claims must be presented within 2 years after the issuance of the certificate of judgment. They were not. As we stated in *Tarver* v. *State*, 761 So. 2d 266, 268 (Ala.Crim.App. 2000), another capital case where the petitioner was facing imminent execution:

> Constitutional claims are subject to the two-year limitation period set forth in Rule 32.2(c), Ala.R.Crim.P. *See Edwards* v. *State*, 671 So. 2d 129 (Ala.Cr.App. 1995), and *Nicastro* v. *State*, 624 So. 2d 665 (Ala.Cr.App. 1992). Also, we have repeatedly held that the procedural bars in Rule 32 apply equally to all cases, including those in which the death penalty has been imposed. *See Nicks* v. *State*, [Ms. CR-96-2446, October 1, 1999] __ So. 2d __ (Ala.Cr.App. 1999); *Horsley* v. *State*, 675 So. 2d 908 (Ala.Cr.App. 1996); *Thompson* v. *State*, 615 So. 2d 129 (Ala.Cr.App.), *cert. denied*, 510 U.S. 976 (1993).

This petition was filed outside the period of limitations; therefore, the trial court correctly granted the State's motion to dismiss the petition.

Arthur attempted to couch one of his issues in terms of the jurisdiction of the court. Jurisdictional issues are not subject to any statute of limitations. See Rule 32.2(c). Arthur argued that the indictment issued against him was void because, he alleged, the district attorney had a conflict of interest. This issue is without merit based on the affidavit filed by the district attorney; however, even if this issue had been meritorious, Arthur has failed to show that he suffered any prejudice. Arthur was indicted twice for this offense by two different grand juries. Arthur was also tried and convicted three times for capital murder. This issue is meritless, not jurisdictional, and is barred by the two-year statute of limitations provision in Rule 32.2(c).

Arthur argues that there is good cause for his late filing of this post conviction petition and that he should be excluded from the preclusion requirement of Rule 32.2(c). This State, insofar as our research shows, has never recognized an exception to the statute of limitations provision in Rule 32.2(c). This rule is mandatory, not permissive, and specifically provides that a trial court "shall not entertain any petition" if that petition is filed outside the limitation period and the petition fails to raise a jurisdictional defect.

Federal habeas corpus relief, similar to our state Rule 32 proceedings, has a one-year specified time limitation period within which a state inmate may file for federal habeas corpus relief. See 28 U.S.C. § 2244(d)(l). However, the Eleventh Circuit and other federal circuits have recognized that "'[section 2244] permits equitable tolling when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable with diligence.'" *Steed* v. *Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (quoting *Sandvik* v. *United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (per curiam)). *Wyzykowski* v. *Department of Corrections*, 226 F.3d 1213, 1216 (11th Cir. 2000). This State has never, insofar as we can ascertain, recognized

any exception to the filing deadline contained in Rule 32.2(c). Even if this State had recognized such an exception, we believe that Arthur failed to show that he is entitled to the "equitable tolling" of the one-year statute of limitations in 28 U.S.C. § 2244.

Arthur further contends that the two-year statute of limitations in Rule 32 results in the unconstitutional suspension of his right to habeas corpus, a right that the United States Supreme Court has held can never be suspended. We agree with Judge Hard's order concerning this argument:

> Arthur contends that the two-year statute of limitations in Rule 32 is an unconstitutional suspension of the writ of habeas corpus. While in the nature of a writ of habeas corpus, Rule 32 is, in fact, a procedural mechanism for seeking post-conviction relief and is promulgated under the rule making authority of the Alabama Supreme Court. Legal procedures such as Rule 32 are subject to reasonable procedural restrictions without such restrictions being a suspension of the writ of habeas corpus. *Felker* v. *Turpin*, 518 U.S. 651, 663-664 (1996). The two-year statute of limitations for raising constitutional claims in post-conviction proceedings is certainly a reasonable restriction and serves the purpose of requiring that constitutional claims be presented in a reasonable time in order to achieve the meaningful result of finality of criminal judgments.

Arthur's interpretation of Alabama's Rule 32 proceedings is contradictory to the express words of the United States Supreme Court in *Pennsylvania* v. *Finley*, 481 U.S. 551, 556 (1987), where that Court stated:

> Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it

> is in fact considered to be civil in nature. See *Fay* v. *Noia*, 372 U.S. 191 (1963). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, *cf. United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) ....

Judge Hard correctly denied relief based on the fact that the petition was filed outside the two-year statute of limitations. For the foregoing reasons, this cause is due to be, and is hereby, affirmed.

AFFIRMED.

McMillan, P.J., and Wise, J., and Maddox, Special Judge,* concur. Cobb, Baschab, and Shaw, JJ., recuse themselves.

*Retired Associate Justice Hugh Maddox was appointed on April 19, 2001, to be a Special Judge in regard to this appeal.

IN THE SUPREME COURT OF ALABAMA

November 2, 2001

1001966

Ex parte Thomas Douglas Arthur. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Thomas Douglas Arthur v. State of Alabama) (Jefferson County Circuit Court: CC-87-577.60; Criminal Appeals: CR-00-1393)

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Writ Denied - No Opinion

HARWOOD, J. - Moore, C.J., Houston, See, Lyons, Brown, Johnstone, Woodall, and Stuart, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 2nd day of November, 2001

s/ Robert G. Esdale, Sr.

Clerk, Supreme Court of Alabama

IN THE TENTH JUDICIAL CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

THOMAS ARTHUR,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. _____
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

MOTION TO FILE AN OUT OF TIME
PETITION FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 32 OF THE
ALABAMA RULES OF CRIMINAL PROCEDURE

Now comes the Petitioner, THOMAS D. ARTHUR, [by and through his pro bono counsel, Arnold Levine,] and moves this court for permission to file an out of time Rule 32 Petition as to all claims raised therein that are subject to the statutory limitations period. Petitioner sets forth the following grounds upon which this relief is requested and, additionally, requests a hearing at which he may present evidence in support of the arguments he makes below:

FACTS

On December 5, 1991, Mr. Arthur was convicted of capital murder in violation of Ala. Code §§ 13A-5-40(13) (murder by a person with a previous murder conviction in

the past twenty years) for the 1982 killing of Troy Wicker.[1] On the same day, following a sentencing hearing that ended less than an hour and a half after the guilty verdict was returned, the jury recommended the death penalty by a vote of 11-1.

On January 24, 1991, the trial court, finding one aggravating factor and one mitigating factor, sentenced Mr. Arthur to death.

Mr. Arthur's conviction and sentence was affirmed by the Alabama Court of Criminal Appeals on March 8, 1996. *Arthur* v. *State*, 711 So. 2d 1031 (Ala. Cr. App. 1996).

The Alabama Supreme Court affirmed on November 21, 1997. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. Sup. Ct. 1998). The Certificate of Final Judgment issued in April 1998.

---

[1] Mr. Arthur was initially tried for the offense in 1982 in the Colbert County Circuit Court. However, this conviction and death sentence were overturned by the Alabama Supreme Court because the prosecutor had improperly introduced detailed evidence about a killing that has resulted in appellant's 1977 murder conviction. *Ex parte Arthur*, 472 So. 2d 665 (Ala. 1985).

Mr. Arthur was tried again, this time on a change of venue to Jefferson County, in 1987. However, the Court of Criminal Appeals set aside his conviction and death sentence, based on the improper admission of a custodial statement made by Mr. Arthur to investigators after he had invoked his right to counsel, and on various instances of prosecutorial misconduct by the Colbert County District Attorney, Gary Alverson. *Arthur* v. *State*, 575 So. 2d 1165 (Ala. Cr. App. 1990), *cert. denied*, 575 So. 2d 1191 (Ala. 1991).

Mr. Arthur has been incarcerated on death row in Holman Prison in Atmore, Alabama, since 1982, the time of his first conviction.

Mr. Arthur is indigent and has not been able to find volunteer counsel since his case was argued to the Alabama Supreme Court.

As a result of his lack of counsel, Mr. Arthur was unable to seek review of the Alabama Supreme Court's affirmance in his case by filing a petition for writ of certiorari in the United States Supreme Court.

Mr. Arthur has subsequently been unable to find counsel during the period authorized under Rule 32 for filing a petition challenging his conviction and sentence of death.

On September 8, 2000, the Attorney General of the State of Alabama filed a motion with the Alabama Supreme court, which was amended on September 15, 2000, requesting that the court set a date for Mr. Arthur's execution. That motion is pending.

Since his case was argued to the Supreme Court, Mr. Arthur has been diligently trying to obtain volunteer counsel to assist him in pursuing post-conviction relief.

These efforts to obtain counsel have involved numerous documented written requests and phone calls to attorneys and public interest law organizations. Mr. Arthur even requested that someone post his request on the Internet.

These efforts, however, did not prove fruitful until just recently, when undersigned counsel, an attorney from New York City, agreed to assist Mr. Arthur, on a pro bono basis, with filing his Rule 32 Petition.

Undersigned counsel agreed to represent Mr. Arthur after his time to file a Rule 32 Petition had already expired and after the Attorney General already filed the motion to set a date for execution.

Mr. Arthur's case is extremely complex. Preparation of the Rule 32 Petition has involved reviewing records and transcripts from all three of Mr. Arthur's trials as well as records and the transcript of the trial of Judy Wicker, Mr. Arthur's co-defendant. In addition, numerous people must be interviewed and reams of documents examined. The undersigned has also traveled to Alabama on an emergency basis and at his own expense to interview Mr. Arthur and to try to investigate jurors and witnesses, many of whom are not living at the same location as in 1982 (when the incident occurred) or in 1991 (at the time of the last trial).

The Rule 32 Petition Is The First Opportunity To Raise Meritorious Claims.

This Rule 32 Petition is Mr. Arthur's first opportunity to seek review of a number of claims including, but not limited to, jurisdictional defect (which is not subject to the Rule 32 statutory limit), ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and juror misconduct. Mr. Arthur is also challenging here for the first time that Mr. Alverson, the District Attorney from Colbert County, was disqualified from prosecuting the case due to an egregious and irreconcilable conflict of interest. This conflict was based on his prior representation of Ms. Judy Wicker in the same matter when he was a defense attorney before joining the prosecutor's office. Ms. Wicker was Mr. Arthur's co-defendant, alleged accomplice, the victim's wife, the state's star witness, Mr. Arthur's ex-paramour, and the victim's wife. She was also convicted for Mr. Wicker's murder. As Mr. Alverson had represented Ms. Wicker with regard to the same matter when he was a defense attorney,

he was not qualified to prosecute the case under the Alabama Rules of Professional Conduct Rule 1.11 and the U.S. and Alabama Constitutions.

After Mr. Arthur's trial, on January 31, 1992, Mr. Arthur's trial counsel, Mr. Harold Walden, filed a motion for a new trial in open court.

On February 28, 1992, this Court ultimately allowed Mr. Walden to withdraw and appointed Mr. Sanderson as counsel for Mr. Arthur's direct appeal.

On May 11, 1992, Messrs. Kevin Doyle and Barry Fisher (who had entered their appearance on behalf of Mr. Arthur on April 3, 1992) filed a Motion to Proceed to Appellate Review. This Court granted counsel's motion and Mr. Arthur's case proceeded to direct appeal. These matters are set forth more fully in the Clerk's record.

On direct appeal, the Court of Criminal Appeals affirmed Mr. Arthur's conviction and sentence. *Arthur* v. *State*, 711 So. 2d 1031 (1996). On November 21, 1997, the Supreme Court of Alabama affirmed, and on March 20, 1998, denied rehearing. *Ex Parte Arthur*, 711 So. 2d 1097 (1997). The Court of Criminal Appeals issued a Certificate of Final Judgment in April 1998.

In light of the foregoing facts and the reasons below, Mr. Arthur now requests this Court to grant this Motion to File Out of Time or, in the alternative, to order a hearing at which the issues raised may be litigated.

DISCUSSION

Lack of Notice

The Court of Criminal Appeals issued the Certificate of Final Judgment in this case in April 1998. The circuit court file, however, does not contain a certificate of service or other proof that Mr. Arthur received notice that the

Certificate had issued and, therefore, that his time for filing a Rule 32 Petition had begun to run. "To hold an accused or the accused's attorney to a time period when the beginning of the period is kept secret by the failure of an official of the state of Alabama . . . denies the accused due process of the law. Fundamental fairness demands that notice be given." *Musgrove* v. *State*, 659 So. 2d 229, 231 (Ala. Crim. App. 1995).

Having never received the Certificate from the trial court and, therefore, no notice that the two-year period for filing a Rule 32 Petition had begun, Mr. Arthur was not at fault for not having timely filed the petition. Thus, he moves this Court to grant his Motion to File Out of Time and, thereby allow him to be heard for the first time on the issues raised therein.

Good Cause To Extend The Time to File

Mr. Arthur asks this Court to accept the Rule 32 Petition filed with this Motion to File Out of Time, as it constitutes Mr. Arthur's first opportunity to be heard on his claims of ineffective assistance of trial counsel and appellate counsel, as well as other viable claims of constitutional violations at trial. As recognized by the Supreme Court of Mississippi, "[t]he reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level. The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus." *Jackson* v. *State*, 732 So. 2d 187, 190 (Miss. 1999).

Despite the vital, in fact, life dependant, importance of these state post-conviction proceedings, Mr. Arthur was unable to acquire counsel within the two-year statute of limitations for filing his Rule 32 Petition. Mr. Arthur, himself, was grossly unqualified to file a pro se Rule 32

petition. Penalizing Mr. Arthur for not filing a Pro Se Rule 32 Petition

> ignores the reality that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [Rule 32].

Id.

Knowing that he was not competent to file a Rule 32 Petition, Mr. Arthur, with no help from the State, made numerous documented efforts to acquire counsel, only to be turned down by attorneys unwilling to undertake the massive, time and financially consuming effort required to represent an indigent death row inmate in post conviction proceedings. It has been recognized that "[o]btaining qualified substitute counsel willing to proceed pro bono on this type of specialized, complex and time-consuming litigation is almost impossible." *Id.*

Upon information and belief, Mr. Arthur is one of the first death row inmates in the country who is facing possible execution without having received *any* postconviction appeals because he was too poor to obtain legal representation. While lawyers are appointed to handle direct appeals in Alabama death penalty cases, Alabama is one of the only states that has no state-funded mechanism for assigning counsel to death row prisoners once a conviction and death sentence is affirmed by the highest state court.

Thus, given Mr. Arthur's good faith efforts to acquire counsel to file a timely Rule 32 Petition on his behalf and given that Mr. Arthur's efforts failed through no fault of his

own, he respectfully asks this Court to grant permission to file an out of time Rule 32 Petition.

Late Filings Have Been Allowed Before

On information and belief, trial courts in Alabama have accepted Rule 32 Petitions filed after the two-year statute of limitations period and have allowed them to be litigated without incident. Because late filings have been accepted previously, this Court should likewise allow it here, especially given the existence of good cause, Mr. Arthur's lack of counsel, in this case. Having permitted late filings previously, it would not be fair to Mr. Arthur not to permit his late filing in this case. Moreover, the existence of cases in which late filings have been permitted and litigated and the existence of a good-cause exception indicate that the Rule 32 statute of limitations is, in fact, not jurisdictional. Mr. Arthur, therefore, asks this Court to grant his Motion to File Out of Time.

Constitutional Rights to Counsel, Due Process, Equal Protection, and Meaningful Access to the Courts

Mr. Arthur has a constitutional right to counsel in Rule 32 proceedings under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the failure of the State of Alabama timely to provide counsel for Mr. Arthur caused the Petition not to be timely filed.

"It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray* v. *Giarratano*, 492 U.S. 1, 14, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J. concurring in judgment). In *Giarratano*, the Supreme Court held that, on the facts there presented, death row inmates in Virginia had no constitutional right to counsel in state post-conviction proceedings. 492 U.S. at 14-15, 109, S. Ct. at 2772-73 (Kennedy, J. concurring in judgment and, as the fifth and

deciding vote, limiting the holding). The fifth vote denying the inmates relief in that case was provided by Justice Kennedy, who concurred in the judgment only and on limited grounds. Justice Kennedy's concurrence limited the Court's holding to the circumstances of that particular case. Justice Kennedy observed that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief." *Id.* at 14-15 (Kennedy, J. concurring in judgment). With that caveat, Justice Kennedy concluded that Virginia's scheme in particular did not violate the Constitution. *See id.* (Kennedy, J. concurring in judgment). The State of Alabama has no scheme resembling that approved of by Justice Kennedy in *Giarratano*. A majority of the United States Supreme Court, therefore, has not yet held that there is no constitutional right to counsel in state post-conviction proceedings under the circumstances that exist for death-row inmates in Alabama.

Additionally, in *Coleman* v. *Thompson*, the United States Supreme Court expressly left open the question whether a constitutional right to counsel exists in state post-conviction proceedings when those proceedings are the first place where a claim, such as ineffective assistance of trial or appellate counsel, are allowed. *Cf. Douglas* v. *California*, 372 U.S. 353 (1963) (holding that criminal appellants have a constitutional right to counsel on their first appeal as of right); *Evitts* v. *Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985) (holding that right to counsel includes right to effective counsel).

Furthermore, the United States Supreme Court has held that in determining the requirements of the Eighth Amendment, its determination will rest on whether there appears to be a national consensus evidencing "the evolving standards that mark the progress of a maturing society."

See, e.g., Stanford v. *Kentucky*, 492 U.S. 361, 369-70, 109 S. Ct. 2969, 2975 (1989) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958) (plurality opinion)). The most important indicia of these standards and whether there is a national consensus are "statutes passed by society's elected representatives." *Id.* at 370, 109 S. Ct. 2975-76. A review of state statutes reveals that there is a national consensus that death row inmates require legal assistance to pursue state postconviction proceedings and remedies.

A Rule 32 Petition is the first opportunity for a convicted defendant to raise a claim of ineffective assistance of counsel. Under Alabama law, a convicted defendant cannot raise claims of ineffective assistance of counsel on direct appeal without first having presented the issue to the trial court. There are essentially two ways of raising the issue in the trial court: by way of a Rule 24 Motion for a New Trial; and by way of a Rule 32 Petition. Because a motion for a new trial under Rule 24 must be filed within thirty days of sentence, almost invariably it is made by trial counsel. Trial counsel is not expected to claim his own ineffectiveness in the Rule 24 motion, thereby barring the claim on direct appeal. Accordingly, practically speaking, a Rule 32 Petition is invariably the first opportunity to raise claims of ineffective assistance of trial and appellate counsel. Thus, a federal constitutional right to counsel in post-conviction proceedings in Alabama is not foreclosed.

Because this Rule 32 proceeding is the first time under state law that Mr. Arthur can be heard on his claims of ineffective assistance of trial and appellate counsel, Mr. Arthur has a constitutional right to be heard through counsel on those claims. Thus, because Mr. Arthur was not appointed counsel within the two-year statute of limitations, he was unable to file a timely Rule 32 Petition. Consequently, this Court should grant Mr. Arthur's Motion to File Out of Time.

Unconstitutional Suspension of the Writ

This Court should grant Mr. Arthur's Motion to File Out of Time, because denying Mr. Arthur permission to file outside the two-year statute of limitations for filing a Rule 32 Petition is an unconstitutional suspension of the writ. Under the Alabama Constitution of 1901, the writ of habeas corpus shall not be suspended and is inviolate. The United States Constitution likewise prohibits suspension of the writ of habeas corpus.

In Alabama, the writ of habeas has been incorporated into Rule 32. That is, "Rule 32 deals only with the procedure for filing what were classified under prior practice as petitions for habeas corpus and petitions for writ of error coram nobis. Rule 32 is a procedural rule which . . . [c]onsolidates habeas corpus and coram nobis into a single comprehensive remedy." *Drayton* v. *State*, 600 So. 2d 1088, 1089 (Ala. Crim. App. 1992). Invocation of the two-year statute of limitations that applies to Rule 32 proceedings is, therefore, an unconstitutional suspension of the writ of habeas corpus under the United States Constitution and the Alabama Constitution.

Thus, to avoid an unconstitutional suspension of the writ of habeas corpus, this Court should grant Mr. Arthur's Motion to File Out of Time.

PRAYER FOR RELIEF

For the foregoing reasons, this Court should grant Mr. Arthur's Motion to File Out of Time or, in the alternative, order a hearing at which he may present evidence establishing his right to file an out-of-time Rule 32 Petition in this case.

Dated: January 25, 2001

Respectfully submitted,

s/ Arnold Levine
ARNOLD LEVINE
49 Thomas Street
New York, NY 10013
(212) 298-5116

IN THE COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

THOMAS D. ARTHUR,	)	
	)	
Appellant,	)	
	)	
vs.	)	Crim. No. 00-1393
	)	
STATE OF ALABAMA,	)	
	)	
Appellee.	)	

STATEMENT OF THE CASE

This appeal arises from the Circuit Court's dismissal without a hearing of Appellant's Motion for Relief From Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

On January 25, 2001, undersigned pro bono Counsel for Appellant filed in the Circuit Court a Rule 32 Motion, *the first post conviction relief sought by Mr. Arthur*, and a Motion to File the Rule 32 Motion Out of Time. On February 26, 2001, counsel received a copy of Appellee's Motion to Dismiss and proposed Order.

Within only one week, the Circuit Court had already granted Appellee's motion and signed the exact Order and Findings of Fact and Conclusions of Law provided by Appellee, without affording Appellant an adequate opportunity to respond to Appellee's motion.

On March 29, 2001, counsel for Appellant filed in the Circuit Court a Motion for Reconsideration asking the court to overrule its Order summarily dismissing Appellant's Rule 32 Petition. On April 11, 2001, counsel for Appellant was

notified that his motion for reconsideration had been denied without comment or explanation on April 4, 2001.

STATEMENT OF THE ISSUES

Appellant's Rule 32 Petition contains numerous meritorious claims of constitutional error at the guilt and penalty phases of his trial, at sentencing, and on appeal. Many of the constitutional claims that are contained in Appellant's Rule 32 Petition were not, and could not be, raised on direct appeal, such as, but not limited to, claims of ineffective assistance of trial and appellate counsel and juror misconduct. Those claims of constitutional error have never been reviewed or litigated in any court.

Mr. Arthur had good cause for filing his Rule 32 Petition beyond the statutory deadline. As an indigent death row inmate, Mr. Arthur was without any legal representation for the entire time period allotted for filing his Rule 32 Petition, notwithstanding his repeated, unsuccessful efforts to obtain pro bono counsel. Further, the lamentable conditions of the law library at Holman Prison, which constituted Mr. Arthur's only access to any legal information, effectively prevented Mr. Arthur, even if he had had sufficient legal training or ability, from knowing about or meeting the filing deadline in any meaningful fashion. In addition, the Alabama circuit courts have permitted such exceptions to the deadline for Rule 32 petitions before.

The manner in which the Circuit Court dismissed Mr. Arthur's Rule 32 Petition was improper. The Circuit Court did not allow the Appellant an opportunity to reply to the responsive papers submitted by the Attorney General. Moreover, the Circuit Court did not allow a hearing or further presentation of evidence, although disputed issues of fact concerning the conflict of interest by the prosecuting District Attorney and numerous other issues were set forth

in the papers. Finally, the draft Order signed *verbatim* by the Circuit Court contained erroneous statements of the law, and adopted a one-sided, untested, and inaccurate version of critical facts the Appellant had set forth in the Rule 32 Petition.

Allowing the dismissal of Appellant's first Rule 32 Petition is a violation of constitutional rights, as guaranteed under the Alabama Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition, such a dismissal is an unconstitutional suspension of the writ of habeas corpus under the Alabama and United States Constitutions.

For the above reasons, Appellant respectfully requests this Court to reverse the Circuit Court's Order dismissing, without a hearing, Appellant's Rule 32 Petition.

STATEMENT OF THE FACTS

On December 5, 1991, Mr. Arthur was convicted of capital murder in violation of Ala. Code §§13A-5-40(13) (murder by a person with a previous murder conviction in the past twenty years) for the 1982 killing of Troy Wicker.[2] On the same day, following a sentencing hearing that ended less than an hour and a half after the guilty verdict was returned, the jury recommended the death penalty by a vote of 11-1. On January 24, 1992, the trial court, finding one aggravating factor and one mitigating factor, sentenced Mr. Arthur to death.

---

[2] Mr. Arthur was initially tried for this offense in 1982 in the Colbert County Circuit Court. However, his conviction and death sentence were overturned by the Alabama Supreme Court because the prosecutor had improperly introduced detailed evidence about

(continued ...)

Mr. Arthur's conviction and death sentence were affirmed by the Alabama Court of Criminal Appeals on March 8, 1996. *Arthur* v. *State*, 711 So. 2d 1031 (Ala. Cr. App. 1996). The Alabama Supreme Court affirmed on November 21, 1997. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. Sup. Ct. 1998). A motion for rehearing was denied on March 20, 1998.

Mr. Arthur was unrepresented by counsel from March 20, 1998, when the Alabama Supreme Court denied his motion for rehearing, until mid to late October 2000, when undersigned pro bono counsel agreed to represent him in his state and federal post-conviction proceedings. During those two-and-a-half years that Mr. Arthur was unrepresented, he diligently tried to obtain an attorney or other legal assistance to aid in the preparation and filing of a petition for post-conviction relief from his conviction and sentence. Solely because of the lack of legal assistance available to him, Mr. Arthur never even filed with the United States Supreme Court a petition for a writ of certiorari to the Alabama Supreme Court on direct appeal. In

---

(... continued)

a killing that had resulted in Mr. Arthur's 1977 murder conviction. *Ex parte Arthur*, 372 So. 2d 665 (Ala. 1985).

Mr. Arthur was tried again, this time on a change of venue to Jefferson County, in 1987. However, the Court of Criminal Appeals set aside his conviction and death sentence, based on the improper admission of a custodial statement made by Mr. Arthur to investigators after he had invoked his right to counsel, and on numerous instances of prosecutorial misconduct by the Colbert County District Attorney, Gary Alverson. *Arthur* v. *State*, 575 So. 2d 1165 (Ala. Cr. App. 1990), *cert. denied*, 575 So. 2d 1191 (Ala. 1991).

fact, in a letter dated June 8, 1998, well within the ninety days allotted for filing a petition for a writ of certiorari with the U.S. Supreme Court, Mr. Arthur wrote to the Court to request an extension of time in which to file the petition, for he had no attorney and was using every mailing allowance he had to find counsel to at least assist him in preparing and filing a petition. Mr. Arthur's ignorance of the law and Court rules was readily apparent, as by letter dated June 19, 1998, the Clerk of the U.S. Supreme Court, with no response at all to Mr. Arthur's need for counsel, informed him that he had not followed the Court's rules.

Additionally, during 1998 and 1999, because the State had no mechanism for providing him any legal assistance, much less an attorney, Petitioner had to try to obtain legal assistance on his own while confined to his cell on death row. Mr. Arthur wrote letters to numerous lawyers and attorney associations, including the American Bar Association, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the Southern Poverty Law Center, requesting their help in obtaining legal representation or some other legal assistance. Mr. Arthur also had someone post his plea for legal assistance, along with a brief statement about his case, on the Internet. Eventually, an investigator who viewed the website became interested in Mr. Arthur's case and offered his assistance in both investigating and finding counsel. His written requests to visit Mr. Arthur to discuss the case, however, were denied in writing by the Holman Prison Warden, Charlie Jones. Similarly, Warden Jones denied the investigators access to Mr. Arthur even after receiving a letter from a lawyer who stated that he was considering representing Mr. Arthur and who asked that the investigators be permitted to visit with Mr. Arthur on his behalf.

The State of Alabama failed to provide Petitioner with an adequate law library or other assistance that would have enabled him to file timely post-conviction petitions in state and federal court. Over the entire time that the deadlines for filing post-convictions has run, Mr. Arthur has been on death row in Holman Prison, located in Atmore, Alabama.

Holman Prison contains separate law libraries for the inmates in general population and the inmates on death row. The death-row law library at Holman Prison is much smaller and significantly less equipped than the law library used by the inmates in the general population. It must be shared by all of the more than one hundred and fifty death-row inmates at Holman. The death-row library is used primarily as a day room, not as a library at all.

Many of the important books are missing entirely and the ones that are left behind have had important pages torn out of them. The books are wet from constantly being leaked on and are covered with mildew. The relatively few books that are contained in the library are in poor condition and are kept in piles, instead of on shelves. Moreover, they are not piled in any particular order, making finding a desired book, on the off-chance it is even stocked in the library at all, a time-consuming and hazardous exercise, and often a futile one.

There are no paralegals or other persons trained in the law assigned to work in the death-row law library, leaving literally nobody to teach the inmates how to use the few useful books that may be there. The books are out of date, and there is no practice of advising the inmates of the infrequent arrival of the less out-of-date books.

In addition, there is only one typewriter to be shared by all one hundred and fifty death-row inmates and even that is almost always broken. There is only one copy

machine, but it charges fifty cents per copy, which makes photo copying cases and statutes practically fiscally impossible. Moreover, the death-row inmates are not provided legal pads. They are provided only two stamps per week, on a use-them-or-lose-them basis, which generally is insufficient to send out the types and numbers of pleadings necessary even to commence a post-conviction proceeding.

Thus, the law library provided by the State of Alabama for the death-row inmates at Holman Prison, where Petitioner has been continuously held while the statute of limitations was running, fails to provide even the most basic resources necessary for preparing, filing, and serving a meaningful petition for post-conviction relief

After Mr. Arthur finally procured the undersigned *pro bono* counsel, the preparation and filing of his Rule 32 Petition proceeded expeditiously. In January 2001, Mr. Arthur's *pro bono* counsel filed with the Jefferson County Circuit Court his first Rule 32 Petition and a Motion to File Out of Time. These filings were submitted two months before the Alabama Supreme Court set an execution date.

The Rule 32 Petition and the accompanying motion set forth numerous grounds for relief on the merits and requested a hearing to address disputed issues of fact and to present evidence. Importantly, the Rule 32 Petition raised issues that *have never before been litigated* in Mr. Arthur's case, and that, in fact, could not have been raised before post-conviction proceedings, such as the ineffective assistance of trial and appellate counsel.

Mr. Arthur's state post-conviction petition contended, *inter alia*, that his trial counsel was ineffective for failing to argue for the disqualification of the prosecutor due to his irreconcilable conflict of interest with the chief trial witness; for moving for the appointment of Mr. Arthur as his own "co-counsel" without any inquiry by the court or

counsel as to his competency or his understanding of its ramifications and despite the severe prejudice that accrued to Mr. Arthur; for presenting overtly damaging evidence to the jury at trial; for his failure to perform even rudimentary pre-trial investigation or obtain expert assistance; for his repeated failure to object to gross misconduct by the prosecutor and errors by the trial court during the jury selection and trial. Moreover, the Rule 32 Petition alleged ineffectiveness of trial counsel at the sentencing phase, including, but not limited to, his failure to perform any investigation for mitigating evidence; his own submission of damaging evidence to the jury; and his failure to object to prejudicial and improper comments during the prosecutor's closing statement.

In addition, Petitioner's Rule 32 Petition set forth instances of juror misconduct, violations of *Brady* obligations, and ineffective assistance of appellate counsel.

Further, the Motion to File Out of Time presented factual and legal grounds for allowing the submission of his Rule 32 Petition beyond the statutory deadline, including whether and when Mr. Arthur had access to legal assistance to aid in the preparation and filing of a Rule 32 Petition on his behalf The State's response to this motion contained factual allegations that were disputed by Mr. Arthur and that required resolution by a fact-finder after a hearing.

Without addressing any of the arguments presented by Mr. Arthur, nor ruling on the disputed issues of fact raised in the papers, the Circuit Court granted the State's motion to dismiss the Rule 32 Petition by simply signing the draft Order and Findings of Fact and Conclusions of Law submitted by the attorney representing the State. By his counsel, Mr. Arthur submitted a motion to reargue the Circuit Court's summary dismissal, which was denied on April 4, 2001.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DISMISSED APPELLANT'S RULE 32 PETITION WITHOUT A HEARING, DESPITE THE FACT THAT THE PETITION RAISES NUMEROUS MERITORIOUS CLAIMS OF CONSTITUTIONAL ERROR AND THAT APPELLANT WAS UNREPRESENTED BY COUNSEL FOR THE MORE THAN TWO- AND ONE-HALF YEARS IMMEDIATELY PRECEDING THE FILING OF HIS PETITION.

Appellant, Thomas Arthur, is indigent and has not been able to find volunteer counsel since his case was argued to the Alabama Supreme Court. As a result of his lack of counsel, Appellant was unable to seek review of the Alabama Supreme Court's affirmance in his case by filing a petition for writ of certiorari in the United States Supreme Court. Appellant was subsequently unable to find counsel during the period authorized under Rule 32 for filing a petition challenging his conviction and sentence of death. Since his case was argued to the Alabama Supreme Court, Appellant tried diligently to obtain volunteer counsel to assist him in filing a writ of certiorari in the United States Supreme Court and in pursuing post-conviction relief

These efforts to obtain counsel involved numerous documented written requests and phone calls to attorneys and public-interest law organizations. Appellant even requested that someone post his request on the Internet. These efforts, however, did not prove fruitful until just recently, when undersigned counsel, full-time public defenders in New York City, agreed to assist Appellant, on a pro bono basis, with filing his Rule 32 Petition.

Undersigned counsel agreed to represent Appellant after his time to file a Rule 32 Petition had already expired

and after the Attorney General already filed the motion to set a date for execution.

Appellant's case is extremely complex. Preparation of the Rule 32 Petition has involved reviewing records and transcripts from all three of Appellant's trials as well as records and the transcript of the trial of Judy Wicker, Appellant's co-defendant. In addition, numerous people must be interviewed and reams of documents examined. Counsel has also traveled to Alabama on an emergency basis and at his own expense to interview Appellant and to try to interview jurors and witnesses, many of whom are not living at the same location as in 1982 (when the incident occurred) or in 1991 (at the time of the last trial).

A. The Rule 32 Petition Is The First Opportunity To Raise Meritorious Claims.

The Rule 32 Petition summarily dismissed by the trial court and at issue here is Appellant's first opportunity to seek review of a number of claims, including, but not limited to, jurisdictional defect (which is not subject to the Rule 32 statutory limit), ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and juror misconduct.

Appellant is also claiming in the petition for the first time that Mr. Alverson, the District Attorney from Colbert County, was disqualified from prosecuting the case due to an egregious and irreconcilable conflict of interest. This conflict was based on his prior representation of Ms. Judy Wicker in the same matter when he was a defense attorney before joining the prosecutor's office. Ms. Wicker was Appellant's co-defendant, alleged accomplice, the victim's wife, the state's star witness, and Appellant's ex-paramour. She was also convicted of Mr. Wicker's murder. As Mr. Alverson had represented Ms. Wicker with regard to the same matter when he was a defense attorney, he was not

qualified to prosecute the case under the Alabama Rules of Professional Conduct Rule 1.11 and the U.S. and Alabama Constitutions.

B. The Trial Court Erred In Summarily Dismissing Appellant's First Rule 32 Petition, Because There Exist Disputed Issues Of Material Facts, Requiring A Hearing.

The trial court's Order dismissing the Rule 32 Petition was ostensibly based on the pleadings submitted by the parties. The Order and the accompanying Findings of Fact and Conclusions of Law, all of which literally were written by attorneys for the State and signed by the court, improperly resolved issues of fact without hearings. When there are disputed issues of fact, the court must hold a hearing at which these factual disputes may be properly developed and resolved. *See* Rules Crim. Proc., Rule 32.9 (a); Rules Crim. Proc., Rule 32.7 (d); *Temmis* v. *State*, 698 So. 2d 1170, 1170 (Ala. Crim. App. 1997); *Bray* v. *State*, 627 So. 2d 1075, 1077 (Ala. Crim. App. 1992). Appellant's Rule 32 Petition raises numerous claims of constitutional error that cannot be resolved without a hearing.

The court erred in granting Appellee's Motion to Dismiss without holding a hearing at which the disputed issues of material fact could be resolved. For example, there exists a factual dispute as to the extent of Mr. Alverson's representation of Judy Wicker, the prosecution's star witness at Appellant's trial. In granting the State's motion to dismiss, the court accepted as undisputed the facts alleged in Gary Alverson's affidavit. Mr. Alverson's affidavit, however, merely created, not resolved, a factual dispute. Indeed, the mere fact that Appellee sought and submitted the affidavit demonstrates that there are disputed material facts. For example, Mr. Alverson alleges in his affidavit that he was hired by Judy Wicker's daughter simply to attend a meeting between then District Attorney James Patton and the

Alabama Pardons and Parole Board and to report back whether Mr. Patton had followed through on his promise to Ms. Wicker. (Aff. of Alverson at 1-2.) In fact, Mr. Alverson goes so far as to allege that he thought that at the time he was attending that meeting, Judy Wicker was represented by counsel. (Aff. of Alverson at 2.) Judy Wicker testified under oath as District Attorney Alverson's witness at two of Appellant's trials. Judy Wicker testified under oath at the 1991 trial, as District Attorney Alverson's witness, that she had hired Mr. Alverson to appeal her conviction. (T. at 823.) She also testified at that trial that she first discussed testifying against Appellant only after she got to know Mr. Alverson. (T. at 824-25.) In fact, contrary to what is alleged in Mr. Alverson's affidavit, Judy Wicker testified under oath in Mr. Alverson's presence that she first discussed turning state's evidence after hiring Mr. Alverson. (T. at 825-26.) Moreover, Mr. Alverson's claim that he thought Ms. Wicker was represented by counsel is belied by the very fact that he, not another attorney, represented Judy Wicker and her interests at that meeting. Indeed, it is also belied by Mr. Alverson's failure to contradict or correct any alleged errors in Ms. Wicker's testimony at Appellant's trial. Thus, there is a factual dispute concerning the nature and extent of the attorney-client relationship between District Attorney Alverson and his star witness, Judy Wicker.

Appellee also claims in his Motion to Dismiss that Appellant's Rule 32 Petition" is nothing more than an effort, without legal authority, to delay the State's efforts to carry out the legally imposed sentence in this case." (Motion to Dismiss at 12.) On the contrary, Appellee concedes in the body of the Motion to Dismiss and in the Findings of Fact and Conclusions of Law drafted by Appellee that Appellant's Rule 32 Petition raises numerous claims of error of constitutional magnitude. (*See, e.g.* Motion to Dismiss at 10, 12; Findings of Fact and Conclusions of Law at 4, 7, 9,

10.) Appellee does not controvert any of these constitutional claims on the merits. Thus, it appears that it is Appellee who is attempting to avoid a proper and just resolution of this case. Indeed, Appellee's basic premise is blatantly false, as is evidenced by Appellant's continuous efforts to obtain legal representation and legal assistance so that he could file a Rule 32 Petition, despite being unaware of the two-year statute of limitation. Rather, the delay is the direct result solely of the State's failure to provide Appellant legal assistance in preparing his Rule 32 Petition. Thus, now that Appellant finally has legal representation, it is Appellee who is trying to take advantage of a technicality to prevent the examination of Appellant's numerous claims of constitutional error. While admitting that Appellant's Rule 32 Petition raises numerous constitutional claims, Appellee advocates the execution of an inmate who was never provided with the legal assistance necessary to present the claims in a timely manner. At the very most, Appellee's claim raises an issue of fact that must be resolved at a hearing. Consequently, the trial court should have granted a hearing at which this factual dispute could be resolved.

C. The Trial Court Erred in Summarily Dismissing Appellant's Rule 32 Petition, Because Appellant Never Received A Copy Of The Certificate Of Final Judgment.

The Court of Criminal Appeals issued the Certificate of Final Judgment in this case in April 1998. The circuit court file, however, does not contain a certificate of service or other proof that Appellant received notice that the Certificate had issued and, therefore, that his time for filing a Rule 32 Petition had begun to run. This Court has recognized that "To hold an accused or the accused's attorney to a time period when the beginning of the period is kept secret by the failure of an official of the state of Alabama. . . denies the accused due process of the law.

Fundamental fairness demands that notice be given." *Musgrove* v. *State*, 659 So. 2d 229, 231 (Ala. Crim. App. 1995).

The trial court nevertheless adopted Appellee's unsupported and speculative assertion that Appellant received notice through his attorney. This assumption was incorrect on two grounds: (1) Appellant had already been without any attorney for several weeks when the Certificate issued; and (2) Appellant, in fact, never received a copy of the certificate from his prior attorney, this Court, the trial court, or any other source. Although Appellee alleged, and the trial court accepted, that Appellant "acknowledges he was represented by counsel through the conclusion of his direct appeal in the Alabama Supreme Court" (Findings of Fact and Conclusions of Law at 4) (citing Petition , p. 2, fn. 3), Appellant, in fact, was not represented by counsel on April 7, 1998. Mr. John Rall, who first represented Appellant on his direct appeal to the Alabama Supreme Court, withdrew from the case shortly before oral argument. The Alabama Supreme Court then asked LaJuana Davis, of the Equal Justice Initiative, to step in merely for the purpose of arguing Appellant's case to the Alabama Supreme Court. Ms. Davis's representation of Appellant ended with the denial of her motion for rehearing in the Alabama Supreme Court on March 20, 1998. In fact, Appellant was continuously unrepresented for approximately two years and seven months from that date, when pro bono counsel was finally found to represent Appellant. Indeed, precisely because he was no longer represented by counsel after March 20, 1998, Appellant never petitioned the United States Supreme Court for a Writ of Certiorari.

Appellee has attached no documentation whatsoever establishing that Appellant or even his most recent counsel, in fact, ever were served with the Certificate of Judgment. In fact, neither Appellant nor his most recent counsel ever did receive a copy of the Certificate of Judgment.

Moreover, the absence of legal representation was not Appellant's fault. To the contrary, Appellant mailed out letters to numerous attorneys and bar organizations requesting representation. He even had someone post his plea for representation on the Internet.

Having never received the Certificate and, therefore, notice that the two-year period for filing a Rule 32 Petition had begun, Appellant was not at fault for not having timely filed the petition. Thus, the trial court should have granted his Motion to File Out of Time and, thereby allowed him to be heard for the first time on the issues raised in his Rule 32 Petition. At the very least, a hearing was required to resolve the factual dispute as to whether Appellant ever was served with a Certificate of Judgment and, accordingly, whether Appellant, who was without counsel or any other legal assistance for more than two years, was on notice that the time for filing a Rule 32 Petition had started to run, if it ever began to run at all. A hearing also should be held to resolve the issue whether and why Appellant was unrepresented for the thirty-two months beginning with the Alabama Supreme Court's denial of his motion for a rehearing.

D. The Trial Court Erred When It Failed To Extend For Good Cause The Time For Filing Appellant's First Rule 32 Petition.

The trial court should have granted the Motion to File Out of Time, under Rule 1.3(b) of the Alabama Rules of Criminal Procedure. According to Rule 1.3, when the Rules of Criminal Procedure require an act to be done within a specified time, "the court for good cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect." Ala. R. Cr. P., Rule 1.3 (b). Only three time limits contained in the Rules of Criminal Procedure are excepted from this good-cause extension: the time for making a motion for a

new trial; the time for taking an appeal; and the time for making a motion for a judgment of acquittal pursuant to Rule 20. Ala. R. Cr. P., Rule 1.3(b). As a Rule of Criminal Procedure, Rule 32 is one of the rules to which Rule 1.3 (b) applies. The time for filing a Rule 32 Petition does not fall within the exceptions expressly delineated in Rule 1.3 (b). The time for filing a Rule 32 Petition, therefore, can be extended for good cause shown and, after the deadline, for excusable neglect. Appellant's Motion to File Out of Time established both good cause and excusable neglect. Appellant's inability to file a Rule 32 Petition within two years of the issuance of the certificate of judgment was directly attributable to the State's continuous and ongoing failure to provide Appellant an attorney or any other legal assistance during that time. At the very least, the trial court should have ordered a hearing at which Appellant's claim of good cause and excusable neglect could have been further developed, addressed, and resolved.

"It cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death." *Murray* v. *Giarratano*, 492 U.S. 1, 14, 109 S. Ct. 2765, 2772 (1989) (Kennedy, J. concurring in judgment). Upon information and belief, Appellant is one of the first death row inmates in the country who is facing possible execution without having received *any* postconviction appeals because he was too poor to obtain legal representation. While lawyers are appointed to handle direct appeals in Alabama death penalty cases, Alabama is one of the only states that has no state-funded mechanism for assigning counsel to death row prisoners once a conviction and death sentence is affirmed by the highest state court. As recognized by the Supreme Court of Mississippi, "[t]he reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level. The

importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus." *Jackson* v. *State*, 732 So. 2d 187, 190 (Miss. 1999).

Despite the vital, in fact, life dependent, importance of these state post-conviction proceedings, Appellant was unable to acquire counsel within the two-year statute of limitations for filing his Rule 32 Petition. Appellant, himself, was grossly unqualified to file a pro se Rule 32 petition. Penalizing Appellant for not filing a Pro Se Rule 32 Petition

> ignores the reality that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [Rule 32].

Id.

Knowing that he was not competent to file a Rule 32 Petition, Appellant, with no help from the State, made numerous documented efforts to acquire counsel, only to be turned down by attorneys unwilling to undertake the massive time and financially consuming effort required to represent an indigent death row inmate in post conviction proceedings. It has been recognized that "[o]btaining qualified substitute counsel willing to proceed pro bono on this type of specialized, complex and time-consuming litigation is almost impossible." *Id.*

Despite numerous efforts by Appellant to obtain counsel to assist in preparing his Rule 32 Petition, he was unable to obtain the needed legal assistance. Appellee's

argument below that Rule 32 contemplates the filing of pro se Rule 32 petitions (Motion to Dismiss, at 8), misses the point and merely begs the issue, as does the Findings of Fact and Conclusions of Law written by Appellee and signed by the Court. (Findings and Conclusions, at 5.) In fact, the Findings of Fact and Conclusions of Law actually demonstrates the need for legal assistance before the filing of a pro se Rule 32 Petition. As acknowledged by Appellee and the Court, the trial court may, not must, appoint counsel *after* reviewing a pro se petition to determine the validity of the claims.

This standard, however, presupposes that a prisoner who is expected to file a pro se petition is competent both to identify important legal issues in his case and to state them in a petition in such a manner and with sufficient specificity to cause the reviewing judge to consider them valid and viable. Here, Appellant had no legal assistance at all after March 20, 1998, when the Alabama Supreme Court denied his motion for rehearing. Appellant has no formal legal education, does not know the rules of evidence, and does not even know how to conduct legal research. Moreover, the death-row library at Holman prison is wholly inadequate, as, among other deficiencies, it is missing many important books, the books that it does have are missing important pages, the books are out of date. Importantly, no such education in lieu of legal assistance was made available to Appellant by the State.

Of course, given that Appellant has been continuously incarcerated at Holman Prison, it was impossible for him to investigate, which is essential to meeting the specificity requirements of Rule 32 as well as to establishing the merits of his claims. The State's failure to provide Appellant either a legal education, counsel, or some other legal assistance, therefore, was directly responsible for the delay in filing his Rule 32 Petition.

Accordingly, the trial court should have found good cause and excusable neglect and extended the time necessary for Appellant to file the Rule 32 Petition. At the very least, the trial court should have ordered a hearing at which evidence could have been presented on this point.

E. The Trial Court Erred In Summarily Dismissing Appellant's First Rule 32 Petition, Because Other Untimely Rule 32 Petitions Have Been Accepted And Decided On Their Merits.

On information and belief, trial courts in Alabama have accepted Rule 32 Petitions filed after the two-year statute of limitations period and have allowed them to be litigated without incident. Because, late filings have been accepted previously, the trial court should likewise have allowed it here, especially given the existence of good cause, Appellant's lack of any legal assistance or adequate legal resources, in this case.

Alabama courts have permitted the filing of Rule 32 Petitions past the two-year statute of limitations and have, in fact, decided those petitions on the merits. For example, in *Callahan* v. *State*, 767 So. 2d 380 (Ala. Crim. App. 1999), the Alabama Supreme Court affirmed the conviction and death sentence on November 17, 1989, and the Court of Criminal Appeals issued its certificate of judgment on January 30, 1990. The Rule 32 Petition, however, was not filed until September 30, 1992, two years and eight months after the certificate of judgment was issued. The circuit court in that case, nevertheless, without any objection by the State, granted Callahan an evidentiary hearing and decided the petition on its merits. Likewise, on appeal, this Court affirmed the circuit court's decision on its merits, without questioning the timeliness of the petition. It is clear, therefore, that Rule 32 petitions filed more than two years after the issuance of the certificate of judgment have been accepted and decided on their merits.

Having permitted late filings previously, it would not be fair to Appellant not to permit his late filing in this case. Moreover, the existence of cases in which late filings have been permitted and litigated and the existence of a good-cause exception indicate that the Rule 32 statute of limitations is, in fact, not jurisdictional. The trial court, therefore, should have granted his Motion to File Out of Time and allowed a hearing on the claims in his Rule 32 Petition. At the very least, the trial court should have granted a hearing on the issue of whether late filings have previously been accepted and decided.

F. The Trial Court's Summary Dismissal Of Appellant's Rule 32 Petition Violated Appellant's Constitutional Rights To Counsel, Due Process, Equal Protection, Meaningful Access to the Courts, And To Be Free From Cruel And Unusual Punishment.

Appellant had a constitutional right to legal assistance in preparing and filing a petition in Rule 32 proceedings under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the failure of the State of Alabama timely to provide legal assistance for Appellant caused the Petition not to be timely filed.

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds* v. *Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 1494 (1977). Indeed, the Supreme Court has held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828, 97 S. Ct. at 1498; *see Lewis* v. *Casey*, 518 U.S. 343, 346, 116 S. Ct. 2174, 2177 (1996)("prison law libraries and legal assistance programs are . . . the means

for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'"). In practical terms, this right of access means that indigent prisoners are entitled not only to adequate prison law libraries and legal assistance programs, but also "paper and pens to draft legal documents with notarial services to authenticate them, and with stamps to mail them." *Bounds*, 430 U.S. at 824-25, 97 S. Ct. at 1496.

An actual violation of the inmate's constitutional right of access to the courts is presented when the State's failure to provide an adequate law library or adequate legal assistance results in the prisoner's complaint being dismissed on technical grounds *see Casey*, 518 U.S. at 351, 116 S. Ct. at 2180, or in his nonfrivolous legal claim being frustrated or impeded, *id.* at 352-53, 116 S. Ct. at 2181. The courts must "remedy past or imminent official interference with individual inmates' presentation of claims to the courts." *Id.*, at 349, 116 S. Ct. at 2179.

In this case, Appellant's fundamental right to meaningful access to the courts was violated by the State's failure to provide adequate legal assistance or resources to enable Appellant to prepare and file a sufficient petition for post-conviction relief under Rule 32. The injury suffered by Appellant from the State's failure to allow him access to courts is actual and severe: his first and only filing for state post-conviction relief has been dismissed as untimely, and his first petition for a writ of habeas corpus has been filed out of time in federal court.

It was therefore the failure of the State of Alabama to provide any legal assistance or adequate legal resources to Appellant in the preparation and filing of a petition for post-conviction relief that resulted in his untimeliness and, thereby, denied him his fundamental constitutional right of meaningful access to the courts.

The trial court, therefore, should not have dismissed the Rule 32 Petition without a hearing. At the very least, the trial court should have granted a hearing at which the issue of access to the courts could have been developed and resolved. *See Whalem/Hunt*, 233 F.3d 1146, 1148 (9th Cir. 2000)(ordering hearing on inadequacy of library and research difficulties); *Helton* v. *Secretary for the Dept. of Corr.*, 233 F.3d 1322, 1325 (11th Cir. 2000)(affirming district court's determination that limitation period should be equitably tolled, in part, because of found deficiencies in the prison library system).

In addition, Appellant had a constitutional right to legal assistance in preparing and filing his Rule 32 Petition. In *Giarratano*, the Supreme Court held that, on the facts there presented, death row inmates in Virginia had no constitutional right to counsel in state post-conviction proceedings. 492 U.S. at 14-15, 109 S. Ct. at 2772-73 (Kennedy, J. concurring in judgment and, as the fifth and deciding vote, limiting the holding). The fifth vote denying the inmates relief in that case was provided by Justice Kennedy, who concurred in the judgment only and on limited grounds. Justice Kennedy's concurrence limited the Court's holding to the circumstances of that particular case. Justice Kennedy observed that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief." *Id.* at 14-15 (Kennedy, J. concurring in judgment). With that caveat, Justice Kennedy concluded that Virginia's scheme in particular did not violate the Constitution. *See id.* (Kennedy, J. concurring in judgment). The State of Alabama has no scheme resembling that approved of by Justice Kennedy in *Giarratano*. A majority of the United States Supreme Court, therefore, has not yet held that there is no constitutional right to counsel in

state post-conviction proceedings under the circumstances that exist for death-row inmates in Alabama. Contrary to Appellee's assertion in his Motion to Dismiss and his draft of the Court's Findings of Fact and Conclusions of Law that was adopted *verbatim* by the trial court, it is not well-established at all that under the circumstances of this case Appellant had no right to counsel in his state post-conviction proceedings. Oddly, Appellee failed to address Justice Kennedy's controlling opinion in *Murray* v. *Giarratano*, 492 U.S. 1, 14-15 (1989) (Kennedy, J. concurring in judgment and, as the fifth and deciding vote, limiting the holding). Instead, Appellee cited *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-57 (1987), which pre-dated *Giarratano* and did not involve a capital post-conviction scheme. Indeed, it is clear that had the *Giarratano* case involved the Alabama post-conviction scheme, rather than Virginia's scheme, Justice Kennedy would have provided the fifth vote requiring legal assistance for death-row prisoners, such as Appellant, who wish to initiate post-conviction proceedings. In fact, it is likely that a majority of the Court would find Alabama's non-scheme unconstitutional.

Additionally, in *Coleman* v. *Thompson*, the United States Supreme Court expressly left open the question whether a constitutional right to counsel exists in state post-conviction proceedings when those proceedings are the first place where a claim, such as ineffective assistance of trial or appellate counsel, are allowed. 501 U.S. 722, 111 Sup. Ct. 2546 (1991). *Cf. Douglas* v. *California*, 372 U.S. 353 (1963) (holding that criminal appellants have a constitutional right to counsel on their first appeal as of right); *Evitts* v. *Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985) (holding that right to counsel includes right to effective counsel). A Rule 32 Petition is the first opportunity for a convicted defendant to raise a claim of ineffective assistance of counsel. Under Alabama law, a convicted defendant cannot raise claims of

ineffective assistance of counsel on direct appeal without first having presented the issue to the trial court.

Furthermore, the United States Supreme Court has held that in determining the requirements of the Eighth Amendment, it's determination will rest on whether there appears to be a national consensus evidencing "the evolving standards that mark the progress of a maturing society." *See, e.g., Stanford* v. *Kentucky*, 492 U.S. 361, 369-70, 109 S. Ct. 2969, 2975 (1989) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958) (plurality opinion)). The most important indicia of these standards and whether there is a national consensus are "statutes passed by society's elected representatives." *Id.* at 370 109 S. Ct. 2975-76. A review of state statutes reveals that there is a national consensus that death row inmates require legal assistance to pursue state postconviction proceedings and remedies.

Appellee, and therefore the trial court, neglected to address Appellant's argument that, under the Eighth Amendment's "national consensus" analysis, Alabama was required to provide legal assistance to Appellant in preparing and filing his Rule 32 Petition. Appellee obviously chose to ignore this argument because he had no counter-argument. A review of the law in the states that have the death penalty reveals unquestionably a national consensus in favor of requiring legal assistance to death-row inmates in their first state post-conviction proceeding.

Because this Rule 32 proceeding was the first time under state law that Appellant could be heard on his claims of ineffective assistance of trial and appellate counsel, Appellant had a constitutional right to be heard through counsel on those claims, or at least to have legal assistance in preparing and filing his Rule 32 Petition. Thus, because Appellant was not appointed counsel or provided any other legal assistance within the two-year statute of limitations, he

was unable to file a timely Rule 32 Petition. Consequently, the trial court should have granted Appellant's Motion to File Out of Time and should have granted a hearing on the issues raised in the Rule 32 Petition. At the very least, the trial court should have granted a hearing on the issues of lack of legal assistance and lack of legal resources.

G. The Trial Court's Summary Dismissal Of Appellant's Rule 32 Petition Constituted An Unconstitutional Suspension Of The Writ.

The Circuit Court should have granted Appellant's Motion to File Out of Time, because denying Appellant permission to file outside the two-year statute of limitations for filing a Rule 32 Petition was an unconstitutional suspension of the writ. Under the Alabama Constitution of 1901, the writ of habeas corpus shall not be suspended and is inviolate. The United States Constitution likewise prohibits suspension of the writ of habeas corpus.

In Alabama, the writ of habeas corpus has been incorporated into Rule 32. That is, "Rule 32 deals only with the procedure for filing what were classified under prior practice as petitions for habeas corpus and petitions for writ of error coram nobis. Rule 32 is a procedural rule which. . . [c]onsolidates habeas corpus and coram nobis into a single comprehensive remedy." *Drayton* v. *State*, 600 So. 2d 1088, 1089 (Ala. Crim. App. 1992). Invocation of the two-year statute of limitations that applies to Rule 32 proceedings is, therefore, an unconstitutional suspension of the writ of habeas corpus under the United States Constitution and the Alabama Constitution.

The Order prepared by Appellee and signed by the trial court as submitted incorrectly cited *Felker* v. *Turpin* in support of the claim that a two-year statute of limitation on a first state capital post-conviction petition is not an unconstitutional suspension of the Writ of Habeas Corpus,

even when the death-row inmate is denied access to the legal assistance necessary to bring the petition within the two-year period. Appellee, and therefore the trial court, cited *Felker* v. *Turpin*, 518 U.S. 651, 663-64 (1996), for the broad proposition that "[l]egal procedures such as Rule 32 are subject to reasonable procedural restrictions without such restrictions being a suspension of the writ of habeas corpus." (Findings and Conclusions, at 6.) *Felker* v. *Turpin*, however, involved the AEDPA's restrictions on a second, or successive, writ, not the complete denial of an opportunity for a first writ of habeas corpus. Indeed, the United States Supreme Court has recognized in other cases involving a first writ of habeas corpus the importance of allowing a first writ of habeas corpus and obtaining a determination on its merits. Indeed, in *Lonchar* v. *Thomas*, the United States Supreme Court recognized that "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the Appellant the protections of the Great Writ entirely, risking injury to an important interest in human liberty." 517 U.S. 314, 324 (1996) (emphasis in original). Thus, Appellee's and the court's reliance on *Felker* is misplaced. The right to a writ of habeas corpus is included in both the Alabama and Federal Constitutions. Given the importance of a first habeas corpus petition, in state court as well as in federal court, denying a death-row prisoner's access to the writ cannot be achieved by a mere statutory time limit, particularly one as short and inflexible as Appellee and the Court suggest. Rather, even were a statutory time limit permitted to curb the constitutional right to a writ of habeas corpus, the limit would have to operate within constitutional constraints. *See Lonchar*, 517 U.S. at 323, 330. A two-year time limit for a death-row inmate who is continuously without legal representation or other legal assistance is an unconstitutional restraint on the inmate's opportunity for a writ of habeas corpus.

Thus, to avoid an unconstitutional suspension of the writ of habeas corpus, the trial court should have granted Appellant's Motion to File Out of Time and granted a hearing on the issues raised in Appellant's Rule 32 Petition. At the very least, the trial court should have granted a hearing on whether the statute of limitation as applied to the facts of this case is a constitutional constraint on the writ.

H. The Court Erred in Signing the Order Prepared by Appellee.

The Circuit Court also erred in signing the Order prepared and submitted by Appellee, in that the court should have reached its own findings of fact and conclusions of law. In *Hallford* v. *State*, while affirming the Circuit Court's adoption of the State's proposed Order, this Court specifically noted that "We do not have a situation here where the trial court merely adopted verbatim the proposed order of the State." 629 So. 2d 6, 8 (Ala. Crim. App. 1992). Unlike in *Hallford*, in this case, there is no indication whatever that the trial court's adoption of the State's proposed Order was "based on the Court's own evaluation of the evidence and law in the case." *See id.* In fact, it is clear that the trial court did not engage in its own evaluation of the evidence and law in the case, in that the court's Order fails even to address all the issues raised in the Appellant's Motion to File Out of Time and, what's more, omits the same issues ignored by Appellee in his Motion to Dismiss. Thus, given the factual and legal inaccuracies contained in Appellee's Motion to Dismiss and Appellee's proposed Order, the Court erred in adopting Appellee's Order verbatim, particularly in the absence of a hearing at which factual disputes could be developed, addressed, and resolved.

PRAYER FOR RELIEF

For all of the foregoing reasons, considered separately and together, the dismissal of Appellant's Rule 32 Petition violates Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the similar provisions of the Alabama State Constitution. Accordingly, Appellant requests this Court to reconsider and overrule its Order dismissing Appellant's Rule 32 Petition and to Order a hearing at which all of the issues raised by the Rule 32 Petition, the Motion to File Out of Time, and the Motion to Reconsider may be developed further and properly resolved.

Dated: April 20, 2001

Respectfully submitted,

s/ Arnold J. Levine
Arnold J. Levine
E. Niki Warin
49 Thomas Street
New York, NY 10013
(212) 298-5116
FAX (212) 693-1149